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IN THE

Supreme Court of the United States

October Term, 1906.

No. 140.

W. A. WALKER, Executor of the Estate of W. H. ANSLEY, Deceased, Appellant,

vs.

J. W McCLOUD, Trustee, and FRANCIS I. GOWEN, Receiver, of the Choctaw Coal and Railway Company, Appellees.

BRIEF FOR APPELLANT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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STATEMENT OF THE CASE.

This is an action in the nature of ejectment on the equity docket. It was filed on the 13th day of November, 1895, and was instituted for the purpose of securing possession of certain buildings and right of occupancy to the land on which said buildings were situated, and to quiet plaintiff in the title and possession of said property, and to remove cloud from title.

The material averments of the complainant are as follows, to-wit: Said Plaintiff is a Choctaw Indian by blood and resides at South McAlester, I. T. Said Defendants, J. W. McCloud, trustee, and Francis I. Gowen, receiver, of the Choctaw Coal & Railway Co. appear as trustee and receiver of property claimed by said company, so it will be considered in this brief that the Choctaw Coal & Railway Co. is the real defendant in this case.

Said Choctaw Coal & Railway Co. is a corporation organized under the laws of Minnesota and by an Act of Congress authorized to do business in the Indian Territory, and was limited in said act to a certain amount of Indian lands in the Indian Territory as a right of way, and was prohibited from going off of its right of way and occupying other lands.

That on and prior to the time the Choctaw Coal & Railway Company commenced the construction of its railway in and through the Indian Territory, one Fritz Sittel, an inter-married citizen of the Choctaw Nation, who had inter-married with Melvina Pitchlynn, a Choctaw Indian by blood, settled and occupied a tract or parcel of land where South McAlester is now situated; said Fritz Sittel and his wife occupied said land as a farm, the same being common domain of the Choctaw Nation and held in common by the Choctaw tribe of Indians.

Said Fritz and Melvina Sittel had the exclusive right of occupancy of said common domain of the Choctaw Nation so long as

they should occupy the same according to the customs and laws of the Choctaw Nation.

That in the year 1889, said Choctaw Coal and Railway Co., built its line of railway through South McAlester, and its right of way ran through the lands occupied by said Sittel; that while said Choctaw Coal & Railway Co., was building its line of railway along where South McAlester is now located, the officers of said Choctaw Coal & Railway Co., towit: Charles Hartshorne, President of said Railway Co., and William C. Alderson, treasurer of said Company, by and through their General Manager, Edwin Chadick, conspired with Fritz Sittel to build a town where South McAlester is now located, and to build and own houses off of said railway's right of way and in violation of the Act of Congress granting said company its right of way, and in the year 1890 said Choctaw Coal & Railway Co., platted said land aforesaid, or a large portion thereof, and laid out the city of South McAlester distinguishing upon said plat streets, lines, alleys, blocks, lots, etc., and caused said plats to be publicly distributed. That upon said plat the premises in controversy are designated as follows, towit: Lots, Nos. 23, 24, 25 and 26, in Block 48; and lots, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 12; in block 46 and the improvements thereon. All of the aforesaid lots and improvements are located off the right of way of said Choctaw Coal & Railway Co., and the improvements erected on said lots were commenced in 1889, and were built by the Choctaw Coal & Railway Co., and after most of all the buildings had been completed, except the building known as the Kali Inla building, which was under construction, said Fritz and Melvina Sittel executed a mort-

gage on said buildings to Edwin D. Chadick, trustee, to secure Charles Hartshorne and William C. Alderson and their associates in a pretended loan of money on the aforesaid buildings, the associates of said Charles Hartshorne and William C. Alderson being the Choctaw Coal & Railway Co.

That said mortgage was executed by said Sittel and wife on the 23rd day of October, 1890, to Edwin D. Chadick, as trustee, and his successors to secure a pretended loan of money to said Sittel from Charles Hartshorne, William C. Aldersonand their associates, for the sum of $45,000.00, alleged to have been advanced by said Charles Hartshorne and William C. Alderson, of Philadelphia, Pa., and their associates, for the purpose of erecting improvements on the lands of said Sittel and wife in South McAlester aforesaid, and the legal title to said lands and improvements is attempted to be conveyed by said instrument to said Chadick, trustee.

That on the 8th day of January, 1891, upon petition of Langhorne Wister and others filed on said 8th day of January, 1891, aforesaid, in the United States Court for the Central District of the Indian Territory, Francis I. Gowen and Edwin D. Chadick, were appointed receivers for the Choctaw Coal & Railway Co., and the property and franchises, rights of said company, together with the right of operation and management vested in said receivers; subsequently said Chadick resigned, and his successor, James W. Throckmorton died, and thereafter Gowen was retained as sole receiver: that while said Francis I. Gowen was receiver of the Choctaw Coal & Railway Co., aforesaid, he associated himself with Edwin D.

Chadick, trustee, and caused to be completed the erection of the Kali Inla building, and all other buildings under construction by the Choctaw Coal and Railway Co., when said Company went into the hands of said receiver, the money furnished for the completion of said buildings was furnished by the Choctaw Coal & Railway Co.

That while said buildings were being erected by said Choctaw Coal & Railway Co., aforesaid, and on the 14th day of October, 1890, there was passed by the Choctaw Council and approved by the Governor of the Choctaw Nation, an Act of said Nation, demanding of the Choctaw Coal & Railway Co. that it file within sixty days evidence that it is in no way connected with the townsite syndicate and that $2,000.00 is appropriated to employ counsel to represent tthe Nation in this matter. A copy of said act was duly served on said company.

That said improvements were erected and were intended to be erected with the money furnished by said Chadick, trustee, and his associates (Choctaw Coal & Railway Co.) and when said houses and improvements were erected they should be the property of said Chadick, trustee, and his associates (towit, The Choctaw Coal & Railway Co.), and the same is now used by them and has been since their construction.

That while said trust deed, executed by Sittel and wite, to Chadick, trustee, and his associates, purports to leave the title in Sittel and wife, the fact is that it was intended to vest, and did vest the possession and ownership of said improvements in the said

Chadick and his associates.

That said trust deed was made and executed in violation of the laws and customs of the Choctaw Nation and in violation of the laws and treaty stipulations of the United States, and was executed for the express purpose of evading and circumventing the laws and customs and treaties aforesaid and to enable the Choctaw Coal & Railway Co. to own and possess lots and improvements in the Choctaw Nation, off its right of way in South McAlester, I. T., in isolation of the laws and treaties of the United States.

That on the 30th day of October, 1888, there was approved by the Governor of the Choctaw Nation an Act of the General Council of the Nation which provides as follows, towit:

> "That all non-citizens, not in the employment of a citizen of the Choctaw Nation, and not authorized to live in the Choctaw Nation under the provisions of the existing treaty stipulations who have made or bought improvements in said Nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such non-citizens fail to comply with this section then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale in thirty days and sell the same at the appointed time to the highest Choctaw citizen bidder for cash; one half of which shall be paid into their respective treasuries and the other half into tthe nation treasury, etc."

That the Choctaw Coal & Railway Co., advanced the money and caused to be erected the improvements heretofore described; that there was no warrant in law for the erection of the improvements but there is an express prohibition upon the same to be found in the laws and customs of the Choctaw Nation, and the laws and Treaties of the United States, and said Sittel and wife and the defendant conspired together to evade and circumvent the laws, customs and treaties of the Choctaw Nation and the United States with reference to the evasion of the public domain of the Choctaw Nation.

That said improvements were erected for the purpose of renting and leasing and controlling the same, together with the land on which they were situated to non-citizens of the Choctaw Nation, thereby working in violation of law a practical confisication of a part of the public domain of the Choctaw Nation.

That said Chadick was General Manager of said company and had full and complete control of its affairs and after said company went into the hands of receivers the said Chadick and Gowen, the said Gowen associated himself with the said Chadick in the pretended trust deed and acted jointly as receivers, caused to be completed the erection of all buildings under construction at the time said company went into the hands of the receivers. That said McLoud was attorney for defendant and counseled, abetted and advised the advance of money by said defendant for the erection of sai improvements and that he procured the removal of said Chadick as trustee in said fraudulent deed of trust and had himself substituted there-

for.

That in the case of Chadick, trustee, vs. Gowen and Throckmorton, receivers, decided in the U. S. Court at South McAlester, it was adjudgedq that the Choctaw Coal & Railway Co., had advanced $53,220.96 for the erection of the improvements aforesaid and that Hartshorne and Alderson had advanced no part of the money and that McLoud was substituted as trustee in the place of and stead of Chadick, resigned.

That in the year 1895 the Governor of the Choctaw Nation directed the Indian sheriff of Tobucksey county, Choctaw Nation, to advertise and sell the aforesaid improvements to some citizen of the Choctaw Nation, the same being the property of the Choctaw Nation and held by the Choctaw Coal and Railway Co., said sheriff aforesaid was directed to sell said improvements as the property of the Choctaw Nation.

That on the 24th day of June, 1895, in pursuance of said order of said Governor of the Choctaw Nation, and under an by virtue of the laws of the Choctaw Nation, said sheriff of Tobucksey County, after advertising said property according to law, sold the same to citizens of the Choctaw Nation, at which sale E. T. Richards, a Choctaw citizen by intermarriage, James Pusley and W. H. Ansley, citizens by blood, became the purchasers and subsequently Richards and Pusley conveyed to W. H. Ansley, the plaintiff herein.

That all the sheriff's actions as to the sale and payment of said

property were subsequently reported to the Governor of the Choctaw Nation, and the General Council thereof, and approved by said Governor and Council.

That after the sale of said improvements by said Indian Sheriff of Tobucksey county, said J. W. McCloud, trustee, continued to hold possession of said improvements under and by virtue of said fraudulent trust deed, and is in the possession of the same claiming to act as the trustee of defendant and is renting the same to non-citizens and persons not authorized by law to reside in the Choctaw Nation, but expressly prohibited from so doing, and is asserting the legal title to the same, with the right of occupancy to the land, and title as to the improvements and was so doing in the year 1895, and prior to the sale by the Indian sheriff.

That McCloud if not restrained, will on the 30th day of December, 1895, sell said property in furtherance of said fraudulent trust deed and that the same is of the reasonable value of $60,-900.00, and of the monthly rental value of $300.00, and that the right claimed under said trust deed, was well known to both McLoud and Gowen, and that the same could not be enforced as against plaintiff, in any court of either law or equity.

That the said property constitutes no part of the right of way of the defendant but is removed therefrom to a distance of about 400 feet and that the Act of Congress of February 18th, 1888, granting to the defendant a right of way through the Choctaw Nation prescribes that it shall have 100 feet in width and that it shall accept

said right of way upon the express condition that it will neither aid, advise nor assist in changing or extinguishing of the tenure of the Indians in their land and will not attempt to secure from the Indians any further grant of lands or its occupancy than is hereinbefore provided under pains of forfeiting the rights and privileges granted.

That Sittel and wife have long since ceased to assert any interest in said property and if they ever claimed to own said property and improvements, have long since abandoned such claim and by reason of the laws of the Choctaw Nation, all of which plaintiff pleads and prays that the court will take judicial notice of the same, Sittel and wife lost, relinquished and forfeited all right to the exclusive possession of said lands or the improvements thereon and the same became subject to the control of the Choctaw Nation and was so subject at the time of the sale by said sheriff of Tobucksey County.

THE PRAYER.

Said complaint concludes with a prayer to be quieted in the possession of the premises and in the title to the improvements for the various reasons assigned and that an injunction or restraining order issue to restrain McLoud, trustee, from selling said property and that said injunction be made perpetual and that said trust deed be annulled and that plaintiff be decreed the possession of said property and for general relief.

See record pp. 2 to 15 inclusive.

After a general denial of the averments in the complaint defendants answers as follows:

DEFENDANT'S ANSWER.

And for further answer defendant says, that prior to the execution of said deed of trust and the erection of the improvements, Chadick was the manager of the defendant, and that not acting for the defendant, but personally, and without the knowledge of Hartshorne and Alderson and without the knowledge of the defendant, Chadick advanced a large sum of money belonging to the defendant for the erection of the buildings aforesaid.

(2.) That in the case of Chadick, trustee, vs. The Receivers, in which Chadick undertook to enforce rights alleged to have been acquired under, and by virtue of, the trust deed from Sittle and wife, the matter having been referred to Yancey Lewis, Master in Chancery, who reported adverse to Chadick's claim and said report having been confirmed, it was therefore judicially ascertained that Chadick and the Sittels entered into the trust deed for their own private gain and for the purpose of defrauding the defendant, whose money was advanced by Chadick without its consent.

(3.) That the defendant by reason of the premises became entitled to an equity in the improvements constructed with its money and it is entitled to hold and occupy the same for the purpose of reimbursing itself for money advanced by Chadick and that this equity should be impressed by this Court upon the premises.

(4.) That the money advanced has never been collected and that the premises in question and the rents and revenues of the same are not sufficient at the highest value, to satisfy the mortgage indebtedness. That the money invested by Chadick was not known by defendant to be invested for an unlawful purpose and that there was no intention to violate any law of the Choctaw Nation in the erection of said improvements and that in both law and fact, plaintiff is attempting to assert a fraudulent claim and should be repelled.

(5.) That said sheriff's sale is not valid because made in violation of an order of the United States Court of the Central District and that the purchase was made for the benefit of the deputy who could not directly become a purchaser at his own sale, and that no consideration passed, and that the price was grossly inadequate.

(6.) That the sale was not in accordance with the laws of the Choctaw Nation; that the sale was on a credit; that there was no opportunity for competitive bidding; that the Choctaw Nation has no jurisdiction over the person or property of a non-citizen; that the sale was made and the forfeiture declared without any hearing in favor of defendant and without giving it any opportunity to assert its defense; and that the sheriff officially declared defendant an intruder without giving defendant any opportunity to show that said declaration was untrue.

Record pp. 26 to 31 inclusive.

Plaintiff replied to the affirmative matter set forth in defendant's answer by a general traversty or denial of all such matter.

See record pp. 34 & 35 inclusive.

Exhibits to complaint and notice of application for an injunction.

Record pp. 15 to 26 inclusive.

Exhibits to defendants' answer.

Record pp. 31 to 33.

Then was there introduced in evidence on behalf of the plaintiff the depositions of Edwin D. Chadick, C. S. Jones, Fritz Sittel, Jonas Peabody, William Ansley , 2nd Dep. Fritz Sittel, 2nd Dep. William Ansley, Dep. Jack Ellis and W. H. Ansley, in the order named.

Record pp. 36 to 54 inclusive.

Defendant introduced as evidence the deposition of W. H. Ansley.

Record pp. 55 to 56, inclusive.

An agreement of Counsel as to certain evidence introduced by plaintiff and defendant.

Record pp. 57 to 58, inclusive.

Plaintiff here introduced an Act of Congress authorizing the sale and purchase of the property and franchise of the defendant and also authorizing the organization of a new corporation and conferring upon it the privilieges of the old.

Record p. 58.

Here was introduced an agreement of counsel with reference to the introduction of evidence.

Record p. 59.

Plaintiff introduced in evidence an Act of the General Council of the Choctaw Nation known as "Non-Citizens Improvements," and also an Act authorizing the principal chief to employ counsel.

Record pp. 59-60.

Defendant introduced in evidence a report of Yancey Lewis, Special Master Commissioner, made to the United States Court for the Central District at South McAlester in the case of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Co., and also notices of sale in said cause of the property and franchises of said company and a decree discharging the receiver. They were introduced in the order named.

Record pp. 61-72 inclusive.

To the introduction of said report, notice of sale and said decree all in the same document, plaintiff objected because of the incompetency, irrelevancy and immateriality of the same, which objection was by the Court overruled, to which action of the court plaintiff excepted.

Record p. 72.

Defendant introduced as evidence an order made in the case of

E. D. Chadick, trustee, vs. The Receivers, and to the introduction of which order plaintiff objected for incompetency, immateriality and irrelevancy, which objection was by the court overruled to which plaintiff excepted, and for the additional reason that plaintiff was neither party nor privy to that suit and could not be affected by it.

Record pp. 72-73, inclusive.

Defendant introduced as evidence a decree of confirmation in case of Langhorne Wister et al, vs. The Choctaw Coal & Railway Co., and to the introduction of which plaintiff objected for the reason that the same was immaterial, irrelevant, incompetent and for the further reason that plaintiff was neither party nor is privy to that suit and can not be affected by it which objection the court overruled, to which plaintiff excepted.

Record p. 74.

Then was there introduced by defendant as evidence a decree in the case of Langhorne Wister et al. vs. The Choctaw Coal & Railway Co., to which plaintiff objected because incompetent, immaterial and irrlevant, which objection the court overruled and plaintiff excepted.

Record pp. 75-01, inclusive.

Defendant introduced as evidence a supplemental report of Yancey Lewis, Sepcial Master in Chancery, in the case of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Co., to which plaintiff objected for irrelevancy, incompetency and immateriality, which the court overruled and the plaintiff excepted.

Record pp. 101-104, inclusive.

Defendant then introduced in evidence a final decree of confirmation of sale in the case of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Co., to which plaintiff objected, which the court overruled and plaintiff excepted.

Record pp. 104-105, inclusive.

Defendant then introduced as evidence the Master's report in the case of Edwin D. Chadick, trustee, vs. The Receivers, the same appearing as ex. A., to defendant's answer, to which plaintiff objected for immateriality, incompetency, irrelevancy, and plaintiff being neither party nor privy to that suit could not be affected by it, which the court overruled and plaintiff excepted.

Record pp. 31 and 105.

Defendant objected to certain parts of the deposition of William Ansley, which the court sustained and plaintiff excepted.

Record p. 50.

This cause came on and was heard on the 29th day of May, 1902 before the Honorable Wm. H. H. Clayton, Judge of the United States Court for the Central District of the Indian Territory, whereupon the judgment or decree of the court was that plaintiff take nothing by this suit and that defendan recover of plaintiff all his costs herein laid out and expended, to which plaintiff excepted and prayed an appeal therefrom to the United States Court of Appeals for the Indian Territory, which appeal was by the Court granted.

Record pp. 105-106.

Then follows in the record the appeal and supersedeas bond and the supersedeas staying all further proceedings until the merits of the appeal are settled, and the decision of the Court of Appeals of the Indian Territory, and judgment.

Record pp. 106-117, inclusive.

Then follows the petition for appeal to the Eighth Circuit, Assignments of Error, appeal bond, supersedeas and decision of the Court of Appeals for the Eighth Circuit and Judgment.

Record pp. 118-133, inclusive.

Then follows petition for appeal to the Supreme Court of the United States, Assignments of Error, Appeal Bond and acceptance of service.

Record pp. 133-145, inclusive.

UPON THE FOREGOING RECORD PLAINTIFF AND APPELLANT ASSIGNS ERROR.

First: That said United States Court for the Central District of the Indian Territory erred as follows: There is error in the U. S. Court in this, that it is adjudged therein, and decreed that Plaintiff take nothing by this suit, and that Francis I. Gowen, Receiver, recover from Plaintiff all his costs herein laid out and expended, the effect of which is to dismiss Plaintiff's suit, whereas said decree should have sustained said action, and rendered the relief sought,

which decree and judgment was excepted to by Appellant.

Second: The Court erred in excluding from the deposition of William Ansley, a witness on behalf of the Plaintiff, the following, towit:

> "And the chief ratified my action as to the sale and payments of said property, and instructed me to proceed at once an demploy attorneys to assist me in getting possession of the property for the purchasers; and I at once employed attorneys to assist the Plaintiff, W. H. Ansley in obtaining possession of the property sold by me as sheriff. Moseley & Smith, attorneys of Denison, Texas, a firm of lawyers; and Cole & Redwine, attorneys at South McAlester, were employed by the Chief of the Choctaw Nation to assist Plaintiff in obtaining possession of said property. In October, 1895, the Choctaw Council passed a special act, appropriating Fifteen Hundred Dollars, ($1,500.00) to employ attorneys to represent the Choctaw Nation and to assist the Plaintiff in obtaining possession of the property aforesaid. In the December, following, contracts employing the aforesaid lawyers, were signed by Jeff Gardner, Chief of the Choctaw Nation, and my action as deputy sheriff aforesaid, as to the sale and payments of the purchase price of the aforesaid property, was ratified and accepted by the Choctaw Nation."

to which ruling of the Court in excluding said evidence, Plaintiff then and there duly excepted.

Third: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the report of Yancey Lewis, Special Master Commissioner in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Co., of July 17th, 1894, and in admitting said report in evidence—to which the Appellant excepted.

Fourth: The Court erred in overruling and disallowing the Plaintiff's objection to the introduction in evidence of a final order or decree, discharging the Receiver in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 2nd day of March, 1895, in the U. S. Court for the Central District of the Indian Territory at South McAlester, and in admitting said order in evidence, to which action of the Court, Appellant excepted at the time.

Fifth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of a decree in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 17th day of July, 1894, in the U. S. Court for the Central District of the Indian Territory, at South McAlester and in admitting said order or decree in evidence, to which ruling of the Court the Appellant then and there excepted.

Sixth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the supplemental report of Yancey Lewis, Special Master Commissioner, in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, the said report being made to the United States Court for the Central District of the Indian Territory, and in admitting said report in evidence; to the ruling of said Court in admitting said report in evidence the appellant then and there excepted.

Seventh: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the final decree in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 13th day of October, 1894, in the U. S. Court for the Central District of the Indian Territory at South McAlester, and in admitting said final decree in evidence, to which ruling of the Court the Appellant then and there excepted.

Eighth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the report of Yancey Lewis, Master in Chancery, in the cause of Edwin Chadick, Trustee, vs. Receiver of the Choctaw Coal & Railway Company, in the United States Court for the Central District of the Indian Territory, and in admitting said report in evidence over the abjection of said Appellant, to which he then and there excepted.

Ninth: The Court erred in ordering and decreeing that the

to which ruling of the Court in excluding said evidence, Plaintiff then and there duly excepted.

Third: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the report of Yancey Lewis, Special Master Commissioner in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Co., of July 17th, 1894, and in admitting said report in evidence—to which the Appellant excepted.

Fourth: The Court erred in overruling and disallowing the Plaintiff's objection to the introduction in evidence of a final order or decree, discharging the Receiver in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 2nd day of March, 1895, in the U. S. Court for the Central District of the Indian Territory at South McAlester, and in admitting said order in evidence, to which action of the Court, Appellant excepted at the time.

Fifth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of a decree in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 17th day of July, 1894, in the U. S. Court for the Central District of the Indian Territory, at South McAlester and in admitting said order or decree in evidence, to which ruling of the Court the Appellant then and there excepted.

Sixth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the supplemental report of Yancey Lewis, Special Master Commissioner, in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, the said report being made to the United States Court for the Central District of the Indian Territory, and in admitting said report in evidence; to the ruling of said Court in admitting said report in evidence the appellant then and there excepted.

Seventh: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the final decree in the cause of Langhorne Wister, et al, vs. The Choctaw Coal & Railway Company, which was entered on the 13th day of October, 1894, in the U. S. Court for the Central District of the Indian Territory at South McAlester, and in admitting said final decree in evidence, to which ruling of the Court the Appellant then and there excepted.

Eighth: The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the report of Yancey Lewis, Master in Chancery, in the cause of Edwin Chadick, Trustee, vs. Receiver of the Choctaw Coal & Railway Company, in the United States Court for the Central District of the Indian Territory, and in admitting said report in evidence over the abjection of said Appellant, to which he then and there excepted.

Ninth: The Court erred in ordering and decreeing that the

Plaintiff, W. H. Ansley, take nothing by this suit, and ordering and decreeing that the Defendant, Francis I. Gowen, Receiver, have and recover of, and from, the Plaintiff all his costs laid out and expended, to which ruling of the Court Appellant then and there excepted.

Tenth: The Court erred in dismissing Plaintiff's suit and refusing to grant the relief sought, and in taxing the Plaintiff with the costs in this cause.

Eleventh: That the said United States Court of Appeals in the Indian Territory erred:

I. In not reversing the Judgment of the U. S. Court for the Central District of the Indian Territory, because of each several errors of the latter court as to its action, ruling, judgments and judicial proceedings, and in not rendering judgment in favor of said Appellant according to the prayer of his complaint.

II. The U. S. Court of Appeals in the Indian Territory erred in holding that Section 7, of the treaty of 1855, between the United States Government and the Choctaw and Chickasaw Tribe of Indians did not give said Choctaw tribe of Indians authority to pass laws declaring forfeitures of property built on the public domain of the Choctaw Nation in violation of said treaty and the United States laws, which section reads as follows, towit:

> "So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof,

regulating trading and intercourse with the Indian Tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits; excepting however, all persons with their property, who are not by birth, adoption or otherwise, citizens or members of either the Choctaw or Chickasaw tribe, and all persons not being citizens or members of either tribe found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States Agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now, or may be, in the employment of the Government and their families, those peacefully traveling or sojourning in the country or trading therein under license from the proper authority of the United States; and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States Agent, to reside within their limits, without becoming citizens of members of either of said tribes.

III. The United States Court of [illegible]als in the Indian Territory erred in holding that article 43 of the treaty of 1866, between the United States Government and the Choctaw and Chickasaw Tribe of Indians, did not give said tribe of Indians authority to enact and pass laws regulating the forfeiture of non-citizens' improvements built on the public domain of the Choctaw and Chicka-

saw Nation, in violation of Section 7, of the treaty of 1855, between the United States Government and the Choctaw and Chickasaw tribe of Indians, and in violation of article 43 aforesaid, of the treaty of 1866, between the Choctaw and Chickasaw tribe of Indians and the United States Government, and in violation of the Acts of Congress. Article 43 of the Treaty of 1866 aforesaid reads as follows.

> "The United States promises and agrees that no white person except officers, agents and employees of the Government, and any internal improvement company or persons traveling through or temporarily sojourning in, the said nations, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said Nations of Choctaw and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvements as they may deem essential to the welfare and prosperity of the community, or to be taken to interfere with, or invalidate any action which has heretofore been had in this connection by either of the said nations."

IV. The United States Court in the Indian Territory erred in

holding that there was no provision in any treaty made by and between the Choctaw and Chickasaw tribe of Indians and the United States Government, wherein said Choctaw and Chickasaw tribe of Indians has the authority to enact any legislation that shall affect or control non-citizens' improvements built upon the public domain of the Choctawm Nation in violation of the acts of Congress and the treaties between the United States Government and the Choctaw and Chickasaw tribe of Indians.

V. The U. S. Court of Appeals in the Indian Territory erred in holding that the act of the Choctaw Council, known as "Claims and Improvements," did not give the Choctaw Nation and its Sheriffs thereof, the right to advertise and sell improvements built upon the public domain of the Choctaw Nation by non-citizens thereof in violation of the treaties between the U. S. Government and the Choctaw and Chickasaw tribe of Indians and the various acts of Congress, Section 2, of said Act, known as "Claims and Improvements," under which the property in question was sold, reads as follows:

> "Section 3, Article 1. Be it enacted by the General Council of the Choctaw Nation Assembled: All non-citizens not in the employ of a citizen of the Choctaw Nation, under the provisions of existing treaty stipulations, who have made or bought improvements in said Nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such non-citizens fail to comply with this section, then it shall be the duty of the

sheriffs of the Counties in which such improvements may be located to advertise the same for sale in thirty days, and sell the same at the appointed time to the highest Choctaw citizen bidder for cash, one half of which shall be paid into their respective treasuries and the other half into the National Treasury, provided however, that if any such non-citizen shall fail or refuse to deliver possession of such an improvement, he shall be reported by the Sheriff of that county to the Principal Chief, and by said Chief to the U. S. Indian Aegent to take proper steps for the removal and prosecution of such offender, under Section 2118, of the Revised Statutes of the United States; provided further, that a notice of sale shall be posted by the Sheriff in three public places in the county, which shall be legal notice to persons against whom the law operates."

VI. The United States Court of Appeals in the Indian Territory erred in holding that the Act of the Choctaw Council known as "Claims and Improvements," was unconstitutional and null and void.

VII. The United States Court in the Indian Territory erred in holding that the property in controversy was not forfeited to the Choctaw Nation when the same was built upon the public domain of the Choctaw Nation and off of the right of way of the Choctaw Coal & Railway Company, and in violation of the treaties between the United States Government and the Choctaw and Chickasaw tribe of

Indians and in violation of various acts of Congress and more especially in violation of Section 10, of the Acts of Congress, granting the Choctaw Coal and Railway Company a right of way through the Choctaw Nation, which said Section 10 reads as follows:

> "That the said Choctaw Coal & Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither do, advise or assist in any efforts looking towards the change or extinguishment of the present tenure of the Indian in their lands, and will not attempt to secure from the Indians any further grant of land or its occupancy than is hereinbefore provided; provided, that any violation of the conditions mentioned in this section shall operate as a forfeiture of all the rights and privileges of said Railway Company under this act."

VIII. The United States Court of Appeals in the Indian Territory erred in holding that the action of Francis I. Gowen, as Receiver of the Choctaw Coal & Railway Company was improperly brought, and in not holding that he was a proper party in this action

IX. The U. S. Court of Appeals in the Indian Territory erred in holding the objections raised by Appellees in the Court of Appeals in the Indian Territory for the first time, that Francis I. Gowen, Receiver, was an improper party to said action, did not come too late—the objection not being rasied in the U. S. Court for

the Central District of the Indian Territory.

X. The United States Court of Appeals for the Indian Territory erred in affirming the judgment of the United States Court for the Central District of the Indian Territory, and in not reversing the Judgment of the United States Court for the Central District of the Indian Territory, and in not entering a Judgment for the Appellant and granting the relief prayed for in his Pleadings.

XI. The United States Circuit Court of Appeals for the Eighth Circuit erred:

I. Said United States Circuit Court of Appeals erred in not reversing the Judgment of the United States Court of Appeals for the Indian Territory; and the United States Court for the Cstral District of the Indian Territory; because of each of the several errors of each of the aforesaid Courts in the Actions, Rulings, Judgments and Judicial proceedings, and in not rendering judgment in favor of said Appellant, according to the prayer of his Complaint.

II. Said United States Court of Appeals for the Eighth Circuit erred in holding that the sale made by the Sheriff, of the property in controversy, to the purchasers thereof, was null and void, and did not convey title.

III. Said United States Circuit Court of Appeals for the Eighth Circuit erred in halding that the purchasers of the property

in controversy, by reason of the terms of sale made by said Indian sheriff did not acquire any interest or right in said property.

IV. Said United United States Circuit Court of Appeals for the Eighth Circuit erred in holding that the property in controversy was not forfeited to the Choctaw Nation, and in further holding that said Choctaw Nation did not have authority to sell and convey said forfeited property, according to the customs and constructions placed upon said Indian statute, under which said sale was made.

V. Said United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the Judgment of the United States Court of Appeals for the Indian Territory, when in fact, the grounds which the decision of said United States Circuit Court of Appeals for the Eighth Circuit, based its opinion, were never decided by said United States Court of Appeals for the Indian Territory, said United States Court of Appeals for the Indian Territory having decided said action upon a different proposition of law and ground than the one decided by the United States Circuit Court of Appeals for the Eighth Circuit.

VI. The United States Circuit Court of Appeals for the Eighth Circuit erred in holding that it was not necessary to consider whether the Appellees were intruders in the Choctaw Nation, and holding the improvements in violation of law, and that if they were, Appellant had no right to disturb them.

VII. The United States Circuit Court of Appeals for the

Eighth Circuit erred in holding that the duty of enforcing the Choctaw laws in regard to the property in controversy, was not within the jurisdiction of said Court.

VIII. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the Judgment of the United States Court of Appeals for the Indian Territory and the United States Court for the Central District of the Indian Territory, and in not reversing the Judgments of the United States Court of Appeals for the Indian Territory and the United States Court for the Central District of the Indian Territory, and in not entering a Judgment for Appellants and granting the relief prayed for in his pleadings.

ARGUMENT.

The Assignment of Error 1, of the United States Court for the Central District of the Indian Territory and Errors 1 and 7, in the United States Court of Appeals for the Indian Territory, and Errors 1 and 2, in the United States Circuit Court of Appeals for the Eighth Circuit will be considered and argued together.

First Assignment of Error, towit:

The United States Court for the Central District of the Indian Territory erred as follows: There is error in the decre eof the United States Court in this: That it is therein adjudged and decreed that Plaintiff take nothing by this suit and that Francis I. Gowen, Receiver, recover from Plaintiff all his costs herein laid out and expended, the effect of which is to dismiss said suit. Whereas,

said decree should have sustained said action, and rendered the relief sought; which decree and judgment were excepted to by Appellant. Record p. 136.

ERRORS ASSIGNED IN THE UNITED STATES COURT OF APPEALS FOR THE INDIAN TERRITORY.

First Error: Said United States Court of Appeals for the Indian Territory erred in not reversing the Judgment of the United States Court for the Central District of the Indian Territory, and in not endering Judgment in favor of said Appellant according to the prayer of his complaint. 'Record p. 137.

Seventh Error; of the said United States Court of Appeals for the Indian Territory: Said United States Court of Appeals for the Indian Territory erred in houlding that the property in controversy was not forfeited to the Choctaw Nation when the same was built upon the public domain of the Choctaw Nation, and off of the right of way of the Choctaw Coal & Railway Co., and in violation of the treaties between the United States Government and the Choctaw and Chickasaw Tribe of Indians, and in violation of the various Acts of Congrehs, and more especially in violation of Section 10, of the Act of Congress, granting the Choctaw Coal & Railway Co., a right of way through the Choctaw Nation, which said Section 10, reads as follows:

"That said Choctaw Coal & Railway Co., shall accept this right of way upon the express condition binding

upon itself, its successors and assigns, that they will neither do, advise or assist in any manner efforts looking towards the changes or extinguishing of the present tenure of the Indians in their lands, and will not attempt to secure from the Indians any other grant of land or its ocupancy than is herein provided; provided, that any violation of the conditions mentioned i nthis section shall operate as a forfeiture of all rights and privileges of said Railway Company in this Act. pp. 114-139."

ERRORS ASSIGNED IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

First Error: Said United States Circuit Court of Appeals for the Eighth Circuit erred in not reversing the Judgment of the United States Court of Appeals for the Indian Territory and the United States Court for the Central District of the Indian Territory, and in not rendering Judgment in favor of said Appellant, according to the prayer of his Complaint.

Error Two: Said United States Circuit Court o fAppeals for the Eighth Circuit erred in holding that the sale made by the Sheriff of the property in controversy to the purchasers thereof, was null and void, and did not conevy any title.

Record pp. 131-140.

The sole question in this case is: Was the property in controversy forfeited to the Choctaw Nation? If so, the Action of Appellant must prevail. If the property was not forfeited to the Choc-

taw Nation and Appellee had a vested right in said property, then Appellant must fail. This question has not been passed upon by either of the courts heretofore rendering decisions in this case.

It might be well to state the power and authority the Choctaw Nation has in making laws and enforcing the same.

In the treaty of September 27th, 1830, by the Commissioners for the United States and Mingoes Chiefs, etc., for the Choctaw Nation, the United States sold and conveyed to the Choctaw Nation the land now occupied by them, and executed a patent therefor. Said Choctaw tribe of Indians was given full power and authority to organize and establish a government, and in pursuance of said authority, have established a well organized constitutional Government secured to them by treaties and Acts of Congress, with an elective Executive head; with Jegislative and Judiciary system with Superior and Inferior Courts. It is however, essentially a Government of her own creation and rests for its very being upon the authority granted by the United States. Not a sovereign to be true as the United States or the several States are sovereign; but a distinct political society; a dependent political community, and one so completely under the sovereignty and dominion of the United States, that any attempt by a foreign nation to acquire its lands or to form diplomatic action with it, would be considered an invasion of her Territory and an act of hostility.

Cherokee Nation v. Southern Kansas R. Co., 135 U.S.641.
Talton v. Mayes 163 U. S. 376.

Stephens v. Cherokee Nation, 43 U. S. 1055.

The treaties and laws of the United States contemplate the Indian country as completely separated from the states, and the Choctaw Nation as a distinct community; that i nthe executive, legislative and judicialnc branches of our government we have admitted by the most solemn sanction the existence of the Indians as a separate and distinct people and as being vested with rights which constitute them a state or separate people.

Worcester v. Georgia, 6 Pet. U. S., 515 13 C. C. A., p. 519
Stephens v. Cherokee Nation, 43 U. S. (La. Ed.) 1055.

The tribes have always been regarded as having a semi-independent position when they preserve their tribal relations, not as possessed of the full attributes of sovereignty, but as a separate people, with power of regulating their internal affairs and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they reside.

U. S. v. Kegana, 30, U. S. 228.
Stephens v. The Cherokee Nation, 43 U. S. 1056.

The Choctaw Nation under the terms of the constitution was capable of entering into treaty relations between the United States, and the proceedings and judgments of its courts in cases within its jurisdiction stand on the same footing and are entitled to the same faith and credit as those of the Territories of the Union.

Keokuk v. Ulam, 4 Okla., 5.

Cherokee Nation v. Journeycake, 155, U. S., 196.

Talton v. Mayes, 163 U. S., 376.

Cherokee Nation v. Southern Kan. R. Co. 135 U.S.641.

Raymond v. Raymond, 83 Fed. Rep. 721.

Mehlin v. Ice, 56 Fed. Rep. 12.

Although in certain respects the Indian tribes regarded as possessing the attributes of nationality, they are considered not as foreign, but as domestic, dependent nations.

Cherokee Nation v. Georgia, 5 Pet. U. S. 1.

Since the Choctaw tribe of Indians established their government under the treaty of September 27, 1830, between the United States and the Choctaw tribe of Indians, the political Departments of the United States Government, by treaties, by Acts of Congress and by Executive action, have always recognized the Choctaw Nation as a State and a distinct political society, separate from others, and capable of managing its own affairs and governing itself, and the Courts are bound by these Acts of the political Dpartments of the Government.

Thebo v. Choctaw Tribe of Indians, 13, C. C. A. p. 519.

Nethlin et al v. Ice, 5, C. C. A. p. 403.

Cornell's Judges et al, vs. Shannon et al, 11 C. C. A. p. 465.

U. S. Beny. 2 McCrary, U. S. 58.

Earl v. Godley, 42 Minn. 361.

Fisher v. Allen, 2 How. (Miss.) 611.
Johnson v. Johnson, 30 Mo. 72, 77, Am. Dec. 598.
Boyer v. Dively, 58 Mo. 510.
La Riviena v. La Riviena, 77 Mo. 512, 97 Mo. 80.

Congress by Act of June 10, 1896, directed that the Commission to the Five Civilized Tribes, in dealing with the affairs of the Indians, have respect for their laws and customs. Treaties made by the United States with the Choctaw Nation are laws of the United States and constitute a part of the supreme laws of the land of which the Courts must take judicial notice. They are to be construed liberally in favor of the Indians, and an Act of the State Legislature in conflict with them is void.

Woster v. Georgia, 6 Pet. United States 515.
Morgan v. McGee, 15 Hum. (Tenn.) 13.
U. S. v. Payne, 2 McCrary, U. S. 289.
In Re Race Horse 70 Fed. Rep. 598.
Uhlig v. Harrison 2 Dak. 71.
State v. Harold, 9 Kan. 194.
Love v. Hamlin, 21 Fed. Rep. 755.
Choctaw Nation v. U. S. 119 U. S.1.
Uaa-pe-Mangua v. Aldrich, 28 Fed. Rep. 489.

After the ratification of the aforesaid treaty of 1830 and in the year 1837, the Chickasaw Tribe of Indians bought an interest in the Choctaw Nation from said tribe of Choctaw Indians.

II Vol. "Laws and Treaties," p. 361.

Thereafter, and in the year 1855, the Choctaw and Chickasaw tribes of Indians, by treaties with the United States Government, were secured in the unrestricted right of self government of their own affairs, so long as the same was not inconsistent with the constitution, treaties and laws of the United States.

Vol. II, "Laws and Treaties." p. 533, Art. VII, reads as follows:

> "So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian Tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; excepting however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw Tribe, and all persons not being citizens or members of either tribe, found within their limits shall be considered intruders, and be removed from and kept out of the same by the United States Agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully traveling or temporarily sojourning in the country or trading therein under license from the proper authority of the United States, and such as may be per-

mitted by the Choctaws and Chickasaws, with the assent of the United States Agent, to reside within their limits, without being citizens or members of either of said tribes.

Under and by virtue of the treaties of 1830 and 1855, as aforesaid, the Choctaw Nation was given full power and authority to organize and establish a government of its own with legislative, judicial and executive departments.

Article 14 of said Treaty of 1855 provides as follows:

"The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasions and from agressions from other Indians and white persons not subject to their jurisdiction and laws."

Article 8 and Section 4 of the treaty of 1866 between the United States Government and the Choctaw and Chickasaw Indians provides as follows:

"The general council of the Choctaw Nation shall have power to legislate upon all subjects and matters pertaining to the intercourse and relations of the Indian tribes and Nation resident in the Indian Territory: the arrest and extradition of criminals escaping from one tribe to another: the adminstration of justice between members of the several tribes of said Territory, and persons other than Indians and members of said tribes, or Nation, etc."

Having considered the power and authority given the Choctaw Nation by Treaties, stipulations and Acts of Congress, we will now consider the main question in issue in this case as heretofore stated; Was the property in question forfeited to the Choctaw Nation by Appellees by reason of the same being built upon the public domain of the Choctaw Nation, off of the right of way of the Choctaw Coal & Railway Co., and in violation of the Act of Congress granting said Choctaw Coal & Railway Co., a right of way, and in violation of the treaties between the United States and the Choctaw tribe of Indians heretofore referred to, and in violation of the laws of the Choctaw Nation?

It is claimed in this action by Appellant that the property in controversy was forfeited to the Choctaw Nation before the sale thereof by said Indian sheriff, and that when the sale was made by the Indian sheriff, to a citizen of the Choctaw Nation, under the laws of the Choctaw Nation, that said property was sold as the property of the Choctaw Nation, and not as the property of the Choctaw Coal & Railway Co., or a non-citizen for the reason that said Choctaw Coal & Railway Co., had forfeited all rights to said property, and the title thereto had become vested absolutely and completely in the Choctaw Nation, and said Choctaw Nation had a right to sell said property to one of its citizens and execute a deed therefor; and said Choctaw Nation through its officers, sold the property in controversy and executed a deed therefor, upon which Appellant claims title.

Record pp. 20-24 inclusive.

To get a full and complete understanding of this question and

whether or not, the property in question was forfeited to the Choctaw Nation, it is necessary to refer to the Legislation of the Choctaw Nation, and to Act of Congress on this subject. Prior to the year 1888, an Act was passed by the General Council of the Choctaw Nation, entitled "Non-Citizens' Improvements," which reads as follows:

> "Be it enacted by the general council of the Choctaw Nation Assembled: All non-citizens not in the employ of a citizen of the Choctaw Nation, and not authorized to live in the Choctaw Nation under th eprovisions of existing treaty stipulations, who have made or bought improvements in said nation are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such non-citizens fail to comply with this section then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale in thirty days; and sell the same at the appointed time to the highest Choctaw citizen bidder for cash; one-half which shall be paid into their respective treasuries, and the other half into the national treasury, provided, however, that if any such non-citizen fail or refuse to deliver the possession of such an improvement he shall be reported by the sheriff of that county to the principal chief, and by said chief to the United States Indian Agent to take the proper steps for the removal and prosecution of such offender under Section 2118, of the Revised Statutes of the United

States; provided further, that a notice of sale shall be posted by the sheriff in three public places in his county, which shall be legal notice to all persons against whom this law may operate.

"2. Any citizen who shall attempt to protect or screen any non-citizen under the pretense of ownership or any other false pretence, from the operation of the preceding paragraph to defeat the same, he shall incur a penalty of not less than one hundred dollars nor more than two hundred and fifty dollars to be recovered by action in the Circuit Court for the district in which the improvement is located; the amount of such penalyt to be determined by the Circuit Judge of said court; and it shall be the duty of the circuit judges of this nation at each term of their respective courts, to call attention of the grand juries to the provisions of this section, and instruct them to indict all persons violating this section."

Record p. 60.

On the 18th day of February, 1888, Congress passed an Act granting to the Choctaw Coal & Railway Co., the Choctaw Nation having ceded this right to the United States by treaty, a right of way through the Indian Territory and the Choctaw Nation which is as follows:

"That said corporation is authorized to take and use for all purposes of railway and for no other purpose, a

right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & & Railway Co., and to take and use a strip of land 200 feet in width with the length of 3000 feet in addition to the right of way for stations for every ten miles of road, with the right to use such additional ground where, from heavy cuts and fills as may be necessary for the construction and maintainance of the road bed not exceeding 100 feet in width on each side of said right of way, or so much thereof as may be included in said cut or fill; provided, that no more than said addition of land shall be taken for any one station; provided no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used for any purpose but for the convenient operation of said road, telegraph and telephone lines, and when any part thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

"Section 10. That the said Choctaw Coal & Railway Co., shall accept this right of way upon the expressed condition binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any efforts looking toward the changing or extinguishing o fthe present tenure of the Indians in their land, and will not attempt to secure from the Indians any further grant of land, or its occupancy, than is hereinbefore provided. Provided: that any violation of the conditions mentioned in this section

shall operate as a forfeiture of all the rights and privileges of said railway company under this Act."

Record p. 12.

After the Choctaw Coal and Railway Co., had bee ngranted a charter by the Act of Congress aforesaid it proceeded to build its line through the Choctaw Nation, and in the year 1889 and 1890 said Railway Co., undertook to lay off a town where South McAlester is now located, and commenced the erection of buildings off of its right of way on the public domain of the Choctaw Nation. The Choctaw Natiaon feeling agrieved by the invasion and usurpation of its public domain, and well knowing that its rights were being taken by said Choctaw Coal & Railway Co., by reason of said Choctaw Coal & Railwaly Co., violating the Act of Congress that granted its right of way, dealing in townsites and building off of its right of way in South McAlester, said Choctaw Nation in order to protect its rights passed an act at its regular Council, November 14th, 1890, notifying said Choctaw Coal & Railway Co., to cease building off of its right of way, and to file within 60 days evidence with the National Agent of the Choctaw Nation, that it was not connected with the townsite syn- Choctaw Council, was filed with the active officers of the Railway Co. said acts of the Choctaw Council reads as follows:

"Sec. 2. Be it further enacted, that the National Agent is hereby instructed to demand of the officials of the Choctaw Coal & Railway Co., that they file within sixty days evidence that they are not connected, directly or indi-

rectly, with the townsite syndicates; also a copy shall be filed with the principal Chief. If they fail to file such evidence, the National Agent shall declare their coal leases void and so notify them.

Sec. 3. Be it further enacted, that the leases for thirty years are hereby declared to be illegal and null and viod.

Sec. 4. Be it further enacted that the sheriff of each County is hereby instructed to at once diligently inquire into all such illegal leases and report the same to the Principal Chief, and that he cause any improvement erected by non-citizens, corporate or individual, by virtue of said illegal leases, to be advertised for sale in the manner provided by law.

Sec. 5. Be it further enacted, that the Principal Chief is hereby authorized to employ competent counsel to represent the interests of the Nation before the United States Courts, and the sum of $2000 is hereby appropriated out of any money in the Treasury not otherwise appropriated, for the payment of said attorneys. Said amount to be drawn by the principal Chief on his own certificate and disbursed, as to him seems best, and the remainder, if any, to be paid into the National Treasury. All records in such cases to be filed in the office of the National Secretary.

Sec. 6. Be it further enacted, that a copy of this cat be forwarded to the President and Treasurer of said Choctaw Coal & Railway Co., by the National Secretary, and

that this act shall take effect and be in force from and after its passage.

Approved Nov. 14, 1890.

W. N. JONES,
P. C. C. N."

After the aforesaid Act had been served upon the officers of the Choctaw Coal & Railway Co., the said Choctaw Coal & Railway Company, in defiance of said Act, continued to build houses off of its right of way on the public domain of the Choctaw Nation.

Thereafter, and about the year 1893, said Choctaw Coal & Railway Company became financially embarrassed and a Receiver was appointed to take charge of the property of said company, and while said property was in the hands of said Receiver an Act was passed by Congress, and approved August 24th, 1894, which Act authorizes the purchasers of the property and franchises of the Choctaw Coal & Railway Co., to organize a corporation and to confer upon the same all the powers, privileges and franchises vested in the old Company.

Congress being advised by the authorities of the Choctaw Nation that said Choctaw Coal & Railway Co., had violated the Act of Congress permitting it to do business in the Indian Territory, and had taken possession of the public domain of said Nation against the protest of the Choctaw Indians, and Congress realizing that the improvements and houses built on the public domain of the Choctaw Nation off of its right of way, had become forfeited to said Nation,

so stipulated in Sec. 1, of the Act above referred to, that said new corporation when so organized should not have the right to acquire and hold any houses and buildings at South McAlester situate off of the right of way and depot grounds of said Choctaw Coal & Railway Company.

Section 1, of said Act reads as follows:

> "Be it enacted by the senate and house or representatives of the United States of America in Congress assembled, that the purchasers of the rights of way, railroads, mins, coal leasehold estates, and other property, and the franchises of the Choctaw Coal & Railway Company, at any sale made under or by virtue of any process or decree of any court having jurisditcion thereof, shall be, and are hereby constituted a corporation, and shall be vested with all of the right, title, interest, property possession, claim, and demand in law and equity, of, in, and to such rights of way, railroads, mines, coal leasehold estates, and property of the said Choctaw Coal & Railway Company, and with all the rights, powers, immunities privileges and franchises which have been heretofore granted to or conferred upon said company by any act or acts of congress, or which it passessed by virtue of its charter under the laws of Minnesota; provided that such new corporation shall not have the right to acquire and hold any houses or buildings at South McAlester situate off of the right of way and depot grounds said Choctaw Coal & Railway Company."

By reading the aforesaid Act of Congress, it is clearly set forth that said new Company shall acquire all the rights, franchises and interests of the Choctaw Coal & Railway Company and said Act expressly provides that said new Company shall not acquire any interest in houses in South McAlester situate off of the right of way of the Choctaw Coal & Railway Co. Thus Congress clearly set forth by solemn Act, that said Choctaw Coal & Railway Company had forfeited to the Choctaw Nation the improvements situate off of the right of way in South McAlester, and the evidence shows in this case that said property in controversy was never treated as an asset of said Company; was never in the hands of the Receiver; was never sold by the Receiver of said Company and no account of said improvements was ever made in any way whatever. However, said Choctaw Coal & Railway Company, through J. W. McCloud, Trustee, and Attorney for said Company, held possession of said improvements; occupied and leased the same, and in the year 1895, while said improvements were in possession of the Choctaw Coal & Railway Company, the principal Chief of the Choctaw Nation, in pursuance of the Acts of the General Council of tthe Choctaw Nation, and the laws and customs, and the public policy of said Nation as manifested by history, traditions and intercours of said Nation with other people and communities, directed the sheriff of Tobucksey County, Choctaw Nation, to advertise and sell the aforesaid improvements to a citizen of the Choctaw Nation. On the 24th day of June, 1895, said Indian Sheriff proceeded to sell as forfeited to the Choctaw Nation, all the improvements herein mentioned, to the highest Choctaw citizen bidder, at which sale William H. Ansley, James Pusley and

E. T. Richards, all Choctaw citizen bidders, became the purchasers, and deeds were made to them according to the laws of the Choctaw Nation. Subsequently Pusley and Richards conveyed their interest to the Plaintiff.

Rec. pp. 20-24, inclusive. Rec. pp. 49-50.

The improvements in controversy were built off of the right of way of the Choctaw Coal & Railway Company from about the year 1889 to 1891, inclusive.

Dep. Chadick, Rec. pp. 36-44, inclusive.
Dep. C. S. Jones, Rec. pp. 45-46.
Dep. Fritz Sittel, Rec. pp. 47-48.
Dep. Wm. Ansley, Rec. pp. 49-50.

That after the sale of the aforesaid property, on the 24th day of June, 1895, by said Sheriff of Tobucksey County, Choctaw Nation said Wm. Ansley, deputy sheriff, reported his action as to the sale and payment of said property, to the principal Chief of the Choctaw Nation, who accepted and confirmed all of his acts as to the sale and payment of said property, and thereater, when the Choctaw Council convened in October the same year, towit: 1895, the principal Chief transmitted said report of said Deputy Sheriff to the Choctaw Council as to the sale and payment of said property, and all his other acts of said Deputy sheriff were accepted and confirmed by the Choctaw Council, and on the 30th of October, 1895, while Council was still in session, said Choctaw Council passed an Act authorizing said principal Chief of the Choctaw Nation to employ attorneys to

represent the Choctaw Nation in assisting said Plaintiff in obtaining possession of said property, and thus accepting, ratifying and confirming, each and every act o William Ansley, as deputy sheriff, as to tthe sale and payment of said property and said principal Chief at once employed attorneys to represent the Nation and to assist the plaintiff to obtain possession of said property.

Dep. Wm. Ansley, Rec. p. 50.

In October in the year 1895, after the sale of the aforesaid property by said deputy sheriff, in June 1895, as aforesaid, Council passed an act appropriating money to assist the Plaintff to obtain possession of the aforesaid property and to carry out the orders of the Chief and the sale of the property made by the deputy sheirff as aforesaid. Which Act reads as follows, towit:

"Bill No. 27. An Act authorizing the principal Chief to employ Counsel:

Section 1. Be it enacted by the Genreal Council of the Choctaw Nation assembled: That the sum of Two Thousand Dollars ($2,000.00) is hereby appropriated out of any money in the Nation Treasury not otherwise appropriated, and said sum to be placed to the credit of the principal Chief and to be by him used for and in behalf of the Choctaw Nfation, in the employing of able and competent counsel to defend the interest of this nation in all suits now pending or that may hereafter come before the United States courts in any manner relative to the full and

complete execution of the laws of the Choctaw Nation by the Sheriffs of each and every county in the confiscation of property, of property of non-citizens who are now occupying lands or buildings or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation.

Sec. 2. Be it further enacted: That the principal Chief be, and he is hereby, required to make a full and complete report, showing the expenditures of the aforesaid amount of money.

Sec. 3. Be it further enacted, that all acts coming in conflict with this act are hereby repealed, and that this act take effect from and after its passage.

Approved October 30, 1895.

JEFF GARDNER, P. C. C. N."

But to the contention of Appellant, that the property in controversy was forfeited to the Choctaw Nation and that plaintiff secured a good title to the same by reason of the purchase thereof the Defendant makes answer and says: That when Chadick obtained a Trust Deed from Sittel and his wife for a pretended loan of money on the aforesaid property, that said Chadick entered into an agreement, not as Manager of said Company, but personally with Sittels and that Defendant had no knowledge that its funds were being used in the erection of the buildings aforesaid for an unlawful purpose, and that said Defendant became entitled to an equity in the buildings erected off of its right of way with its money, and was entitled to hold and occupy the same for the purpose of reimbursing itself and the

Court is asked to impress the property with this equity. Before this could be done, if at all, it must be shown that there was no bad faith on the part of the Defendant, and no willful intention to gain possession of the Indian lands or violate its charter or the law. This said Defendants have failed to show, for Chadick was their general manager and had full control of all the affairs of the Defendant in the Indian Territory; that he has stated upon oath, to which there is no denial, that he was acting in behalf, and in the interest of the Choctaw Coal & Railway Company, whose money he invested when he made the improvements, and that the trust deed was executed for the purpose of enabling Defendant to build houses off of its right of way in the town of South McAlester, and further in securing the occupancy of the land on which said houses were built, and he says that the Defendant had full knowledge of this expenditure, and that in fact, an account was opened on the books of the Defendant as a townsite account, and the President, Vice-President, Treasurer and other members of the Board of Directors visited South McAlester during the progress of the construction and saw the work going on, and the buildings, and knew the fact, and that the houses were not undertaken to be built off of the right of way of the Company until the facts had been talked over with the active officers of said company, and it was then agreed that the houses in controversy should be built by said company, with its money, off of the right of way, and Chadick in building said houses was carrying out the instructions of the officers of the Company.

Dep. Chadick Rec. pp. 36-44.

Dep. C. S. Jones, Rec. pp. 45-46.

This trust deed executed by Sittels of the Choctaw Coal and Railway Co., bears a stamp of double dealing; of bad faith. It was executed for the express purpose of evading the laws of the United States and of the Choctaw Nation, and in procuring its execution the Defendant made a criminal of Sittel and subjected him to the pains and the penalties of the Choctaw Courts.

Sittel does not now claim, nor did he ever claim said improvements or any interest therein, and recognizes the fact that upon entering into said conspiracy with Chadick, who was acting for the Defendant, he lost all right to control any part of the land, and that the right of the Choctaw Nation to re-enter and sell said improvements was complete.

The Defendant could not be permitted to do indirectly, what it could not do directly; it could not lawfully occupy these lands and make the improvements. Said act could not be legalized by conspiring with Sittel to subvert and circumvent the laws of the Choctaw Nation in fraud of the rights of the Choctaw people.

Dep. Chadick, Rec. pp. 36-44.
Dep. Fritz Sittel, Rec. p. 51.

The Supreme Court of the United States in a case similar to the one at bar, speaking through the eminent Jurist, Mr. Justice Harlan, said:

"A corporation that has violated a public statute in obtaining public lands can be required to surrender them be-

fore it has been reimbursed the amount expended by it in procuring the legal title.

"The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. The Defendant is a wrong doer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands.

"Congress when establishing that policy was not bound to assume that individuals or associations of inidviduals would attempt to defeat it by means of fraudulent schemes or otherwise.

"The proposition that the Defendant having violated a public statute in obtaining lands that were dedicated to other purposes, can not be required to surrender them until it has been reimbursed the amount expended by it in procuring legal title is not within the reason of the ordinary rule, that one who seeks equity must do equity, if sustained would interfere with the prompt and efficient administration of the public domain. Let the wrong doer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employees in violation of law."

United States v. Trinidad Coal and Cokeing Co., 137 U. S. 640-44.

The facts in the aforesaid case show that the Trinidad Coal Co.,

having entered its quantom of the land, 320 acres, conspierd with six of its employes so that each of them entered the quantom prescribed for individuals, which was 160 acres each, and for which the Trinidad Coal Co., paid, and patents were issued severally to each employee, who subsequently conveyed by warranty deed to the Company.

The court held that this was a fraud practiced against the United States government for which the patent could be cancelled without the money being refunded which had been paid. The case at bar is much stronger than this one, for the reason that the Choctaw Coal & Coke Co., had violated the act of congress that gave it existence: had violated the treaties between the United States and the Choctaw Nation and had violated an act of the Choctaw Nation. It conspired with Sittel to practice a fraud upon the Choctaw Nation and to obtain possession of the public domain, which it kne wcould not be done, and therefore the trust deed must be considered null and void, and without any force or effect, and the case stands as though no trust deed had ever been executed, and the sole question as stated before: was the property forfeited to the Choctaw Nation when built upon the public domain?

Defendants say that said sale by said Indian sheriff was made and the pretended forfeiture declared thereby, without any hearing in favor of these Defendants, and without giving them an opportunity to assert any defense, and that said Indian sheriff officially declared

that these Defendants were intruders as to the premises aforesaid, and unlawfully holding the premises in question for that reason without giving these Defendants any opportunity in any Court or place, of showing that said official declaration on the part of the Indian sheriff was false.

To this Plaintiffs make reply: That when said Defendant committed the act of violating the Act of Congress that gave it existence in the Indian Territory, and when it violated the solemn treaties between the Choctaw Nation and the United States governmem said property became forfeited to the Choctaw Nation by operations of the statute, and it was not necessary for Defendant to have a judicial hearing in court, as Defendant by its own acts, and by the operations of law, lost all right to said property when it was built upon the public domain of the Choctaw Nation; and when the Indian sheriff sold said property, he sold it as the property of the Choctaw Nation. Defendants overlook the fact that there is a distinction between common law, and statutory forfeitures. A common law forfeiture is declared and wrought out by the judicial department, while statutory forfeitures are declared and enforced in many instances, by the executive department. And furthermore, statutory forfeitures take place instantaneously upon the commission of the offense, while the common law forfeitures only divesst title upon a proper judgment in a suit instituted for that purpose.

The case at bar presents a case of statutory forfeiture, under,

and by virtue of the act which gave the Defendant existence and also by virtue of thc act of the Choctaw Nation enforceable by the executive departments. Its efficiency is the same, and its results as obligatory, and entitled to tthe same weight and respect as though a regular Court proceeding had been had.

Wood v. U. S. 16 Pet. U. S., 362.

U. S. v. One Hundred Barrels of Whiskey, 2 Abb. U. S. 305.

Bags Coffee, 8 Cranch U. S. 398, U. S. 1960.

While it is true that the forfeiture must be completed b yseizure yet when the seizure is made iit relates back to the time of the forfeiture.

In the Mary Celeste, 2 Lowell, U. S., 354.

Clark v. Protection Insurance Co., 1 Story, U. S. 109.

The forfeiture was effective from the very moment of th illegal encroachment upon the public domain of the Choctaw Nation. The commission of the prohibited act ispo facto operates as a forfeiturs.

U. S. v. One Hundred Barrels of Spirits, 2 Abb. U. S. 305.

U. S. v. 1960 Bags of Coffee, 8 Cranch, 398.

Wood v. U. S., 16 Pet. U. S., 342-369.

Forfeitures are recognized and treated not as contracts but as a punishment for offense. It is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or

hereditaments whereby he looses all his interest therein and they become vested in the party injured as a recompense which he alone or the public together with himself hath sustained; a divesture of property without compensation in favor of another because of a default or offense; a penalty by which one loses his rights and interests in his property.

2 Black Com. 267.
Wiseman v. McNulty, 25 Cal., 237.
Eskin v. Scott, 70 Tex. 445.
Gosslink v. Campbell, 4 Iowa, 300.
Indianapolis v. Fairchild, 1 Ind. 318.
Flin v. U. S., 1 Wyoming, 247.

At common law lands purchased by an alien were forfeited to the commonwealth.

1 Black Com. 372.
2 Black Com. 274.
Read v. Read, 5 Call. (Va.) 207.

When an act of Congress demands an absolute forfeiture as the consequences of an act the title of the United States accrues when the prohibited act is done.

U. S. v. 1960 Bags of Coffee, 8 Cranch, U. S. 398.
Henderson v. Distilled Spirits, 14 Wall U. S. 44.

The Superintendent of Indian Affairs and Indian Agents and sub agents are authorized to remove from the Indian Territory all persons found therein contrary to law, and the President is author-

ized to direct military force to be employed in such removal.

The Commissioner of Indian Affairs is authorized and requested with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law or whose pesence within the limits of the reservation may in the judgment of the Commissioner be detrimental to the peace and welfare of the Indians and he may employ such force as is necessary to enable the agent to effect the removal of such persons.

Rev. Stat. U. S. Secs. 2147-2149 inclusive.

The removal of persons from the Indian Territory under these statutes is a matter entirely within the discretion of the officers to whom the power of removal is committed and their action is not subject to review by the courts.

U. S. v. Sturgeon, 6 Sawy., U. S. 29.

Echols v. Tate, 53 Ark. 12.

Adams v. Freeman 50 Pac. Rep. 135.

Indian Affairs Commission 20, Opinion Atty Genl. U. S. 245.

"Where lands and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act of resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object —will be equally effective and operative."

Atlantic and Pacific R. Co., v. Mingus, 165 U. S. 778.
U. S. v. RePentigney, 72 U. S. 646.
Fairfax v. Hunter, 7 Cranch, U. S. 603.
Smith v. Maryland, 6 Cranch, U. S. 286.

This was an action of ejectment brought by the railroad company in the District Court of San Miguel County ,New Mexico, to recover of the Defendant Mingus, a parcel of land to which the Plaintiff cliamed title under its land grant, made by Act of Congress of July 27, 1866.

The land grant having been made by Congress for the purpose of encouraging the construction of the railroad, coupled with it were many conditions, some of which at least, not having been performed, Congress, on July 6, 1886, passed an act declaring all the lands excepting the right of way "adjacent to and coterminus with the uncompleted portions of the main line of said road embraced within both the granted and indemity limits, as contemplated" by the act of organization, to be "forfeited and restored to the public domain." The validity of his act raised the only question between the parties. In the case at bar the court should not lose sight of the fact that the validity of the act is not questioned, as before stated, it is only the precedure under the act that is the subject of controversy

"The act of 1886 is a naked declaration of forfeiiture and a legislative restoration of the lands of the public domain. It contains no recital of braech of condition. It alleges no failure of performance on the part of the grantee.

It provides for no judicial inquiry into alleged facts of failure to perform, nor the legal effect thereof, nor offsets thereto. It authorizes no subsequent proceedings of any kind to effect a forfeiture or to extend a hearing to the parties in interest. It contains no suggestion of any purpose of devoting the lands to the completion of the road in some other way, or even through some other agency. There is no provision protecting the vested rights of the mortgagee nor making the proposed restoration of the lands subject to their possible rights.

"The law simply declares a forfeiture and requires an immediate restoration of the lands to the public domain. It by legislative declaration divests the outstanding fee-simple title, and by mere force of the statute re-invests the title absolutely to the United States. It restores the lands to the public domain, and thereby subjects them to sale and entry under the general public land laws."

Atlantic and Pacific R. Co. v. Mingus, 165 U. S. 774.

The legislative declaration, the legislative will, is "due process of law" so as to divest the title of the grantee and to reinvset it in the grantor. As to private grants it is usual for forfeiture to become effective by re-entry, no judicial inquiry or procedure being necessary.

By operation of Sec. 10 of the Act of Congress heretofore referred to which permitted the Choctaw Coal & Railway Co., to build

through the Indian Territory, and by Sec. 7 of the Treaty of 1855, and Sec. 43, of the Treaty of 1866, made between the United States Government and the Choctaw and Chicasaw tribe of Indians; and by authority of the hoctaw Nation and an Act of the Choctaw Council, known as "Claims and Improvements," and various other Acts of Congress, the aforesaid property in controversy became forfeited to the Choctaw Nation when built upon the public domain and no judicial hearing was necessary, as, by operation of law, the property became absolutely vested in the Choctaw Nation. In the case of McClure vs. Maitland, decided by the Supreme Court of Va., it was so held by the Court that under the statute enacted by the Legislature of Virginia, requiring all persons who own land to list the same with the Tax Assessor, and failure to do so for a period of five consecutive years, that the same should be forfeited to the State of West Virginia.

The Court held in passing upon the aforesaid case, where the owner thereof had not listed the same with the tax assessor for five consecutive years as aforesaid as follows, towit:

"The title to the land and all the right and interest of the former owner, having thus, by his default and the operation of the law, become absolutely vested in the State and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any purpose in any manner and upon any terms and conditions she

might in her sovereign capacity deem proper, without consulting the former owner or any one else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to, or lien upon the land, than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the state saw proper to transfer and vest her title to so much of said land owned by her in any person other than those who occasioned the default, etc."

McClure vs. Maitland, 24 West Va. 561, 175-178.

By the Legislative Act of Va. it was intended by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding or finding of any kind, in order to consummate the forfeiture.

This Act was held by the Supreme Court of the United States to be constitutional and the Act itself was due process of law.

Henry C. King vs. M. B. Mullins et al., 171 U. S. Supreme Ct.
Report, 43, Law Edition, Page 214.

The constitutional competency of the Legislature of Virginia to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owner by the mere energy and operation of the statutes themselves, has been repeatedly

affirmed by the Court of Appeals of Virginia.

Staats vs. Board, 10 Gratt, 400.

Wild vs. Serpell, 10 Gratt, 4-5.

LeVasser vs. Washburn, 11 Gratt, 572.

Usher vs. Pride, 15 Gratt, 190.

Smith vs. Tharp, 17 W. Va., 221.

Holly River Coal Co. vs. Howell, 36 W. Va., 489, 501.

Henry C. King vs. M. B. Mullins et al., 171 U. S. Supreme Ct.

Reports, 43, Law Edition, page 214.

"Where lands and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object—will be equally effective and operative."

Atlantic and Pacific R. Co. vs. Mingus, 165 U. S., 778.

U. S. vs. Repentigney, 72 U. S., 646.

Fairfax vs. Hunter, 7 Cranch, U. S., 603.

Smith vs. Maryland, 6 Cranch, U. S., 286.

U. S. vs. DeRepentigny, 72 U. S., 643, 646.

McMicken vs. United States, 97 U. S., 204, 217.

Van Wyck vs. Knevals, 106 U. S. 360, 368.
Schulenberg vs. Harriman, 88 U. S., 44, 63.

In further support of this doctrine of forfeiture without judicial inquiry we would refer to the statutes of the Choctaw Nation on the subjects unlawful hunting, intoxicating liquors, etc.

Durant's Code, p. 216, Sec. 3.
Durant's Code, p. 221, Sec. 2.

So careful were the Choctaws of the public domain and so intent were they that there should be no aggressions or encroachments upon it, that by Act of the General Council, they required all citizens desiring to rent or to employ non-citizens to get a permit to do so.

Durant's Code, Sec. 1, p. 238; Sec. 1, p. 240.

To the same effect are the statutes of the United States as applicable to the importation of firearms and whiskey into Alaska, and also to the Seal Fisheries.

Rev. Stat. U. S., Secs. 1955, 1956, 1961, 1968.

Also as to the introduction of wines and spiritous liquors into the Indian country.

Rev. Stat. U. S., 2140, 2041, 2147, 2149.

Also as to the customs, registering, enrolling, and licensing ves-

sels.

Rev. Stat., Secs. 3062, 3074, 3075, 3077, 3082.

Also as to commercial relations with contiguous countries.

Rev. Stat., Sec. 3099.

Also as to internal revenue.

Rev. Stat., Secs. 3187, 3188, 3242, 3257, and 3458.

And so are the statutes with reference to reprisals, exclusions of Chinese laborers and perhaps other subjects.

Under the Chineee exclusion act it is within the constitutional power of Congress to deport Chinese unlawfully in the United States and to commit the enforcement of the law to executive officers.

Wing Wong v. U. S., 163 U. S., 235.
Fong Yue Ting v. U. S., 149 U. S., 698.
Chae Ching Pang v. U. S., 130 U. S., 581.

This case emphatically calls for the settled rule that those claiming rights against established and recognized governments must stand upon express provisions.

Dubuque and P. R. Co. v. Litchfield, 16 U. S. La. Ed., 509.
Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 740.
Coosan Min. Co. v. South Carolina, 144 U. S. 562.

The right claimed by this Defendant being against the Choctaw Nation it must be so clearly defined and established that it does not admit of doubt in the mind of the court and must rest upon express provisions of the law.

But as conclusive of this while matter a sale of non-citizens' improvements under an act of the General Council of the Cherokee Nation, similar to the one at bar in all its essentials, has been passed upon by this Honorable Court and sustained.

Hockett v. Alston, 58 S. W. R. 677.
Stephens v. Cherokee Nation, 174 U. S. 445.

From the aforesaid cited authorities on forfeiture we think it conclusively shown that the property in controversy when sold by the Indian Sheriff was forfeited to the Choctaw Nation, and that Defendant had no vested right in said property.

If so, the action of the Plaintiff is complete. But the Defendant contends that the sale made by the Indian Sheriff was not in accordance with the laws of the Choctaw, and that the property was sold on a credit and therefore the Plaintiff acquired no title for the reason he did not pay cash for said property.

The Court of Appeals for the 8th Circuit, in deciding this case held that Plaintiff did not acquire any right to the aforesaid property

for the reason he did not pay cash for the same.

Rec. p. 132.

Part of the opinion of the Court of Appeals for the 8th Circuit raeds as follows:

> "The act of the Choctaw Legislature under which the Plaintiff claims, did not purport to transfer the title or right to improvements made, or bought, by a non-citizen except upon a sale by the sheriff" to the highest Choctaw citizen bidder for cash.

An officer making a sale under such a statute must yield obedience to its directions. He can not sell upon credit or accept any other than an unconditional cash bid. So also a purchaser whose bid is made an daccepted in disregard of the directions of the statute, or who does not pay the purchase price acquires no interest in a right to the property."

The following authorities are cited by the Court:

Hooper v. Castetter, 45 Neb., 67, 76.
Phelps v. Jackson, 31 Ark. 272, 278.
People ex rel. v. Hays, 5 Cal. 66.
Negley v. Stewart, 10 S. & R. 207.
Robins v. Bellas, 2 Watts 359.
Wheatley v. Tutt, 4 Kans. 195.

Swope v. Andery, 5 Ind. 313.
Reynolds v. Wilson, 15 Ill. 394.

By Reading the aforesaid authorities there is not a one of them that has a centilla of application to the case at bar. All of the aforesaid authorities show that where sales were set aside on account of irregularity of the sale, or where a statute was not strictly followed is where the party who filed proceedings to set the sale aside had vested rights in the property. In the case at bar the Defendant has no vested rights, and before a party can be heard to complain he must show an interest in the property.

This sale is unlike the ordinary judicial or foreclosure sale in which the ostensible owner of the property has vested right or an equity, and his title to the remainder, if there should be one after the process of the sale are set aside.

The Defendant has no interest in the improvements sold. His interest past with the forfeiture. He could neither be benefited nor harmed by it. It does not concern the Defendant whether the sale was regular or irregular, or whether or not, the statute was followed, or how much the property brought, as the improvements when sold were not the property of the Defendant, but of the Choctaw Nation, and the sale past title from the Nation to the Plaintiff, and no one could object to the sale but the Choctaw Nation. Said Nation was satisfied with the sale.

A person not interested in the property sold can not be heard in

objection to the sale and the person attacking the sale must be able to show injury resulting to him therefrom.

McLaughlin v. Bradford, 82 Ala. 43.
Moniton of Johnson, 3 La. Ann. 656.
Fortier v. Simpel, 6 La. Ann. 53.
Stockton v. Downey, 7 La. Ann. 581.
Gilmer v. Nicholson, 21 La. Ann. 589.
Bachle v. Webb, 11 Neb. 429.
Frink v. Morrison (Supreme Ct. S. Pp. T.), 13 Abb. Pr. (N. Y. 80.)
Brockman v. Allison, 1 Ky. L. Rp. 278.

An examination of the Authorities cited by the U. S. Circuit Court of Appeals for the Eighth Circuit in the Opinion rendered by it, shows as follows:

In the case of Hooper v. Castetta, 45 Neb. Page 67-76, 63 Northwestern, page 135-45, holds as follows:

This was an action to foreclose a mortgage by Abraham Castetta against O. N. Remington and wife, mortgagors, and Edward Hooper et al., judgment creditors.

And a decree was had by Castetta authorizing a sale of the property. The sheriff did not follow the terms of the decree. Hooper et al. judgment creditors who had vested rights against O. N.

Remington and wife, intervened to set aside the sale for want of regularity. The court sustained the action and set aside the sale.

Peoples vs. Jackson, 31 Ark., pp. 272-278, holds as follows: A held two notes of equal amount, for the purchase money of land. He transferred one of them to B as collateral security for a debt. A afterwards died and proceedings to foreclose the vendors lien were brought in the name of the Administrator upon both notes. Under a decree of foreclosure for cash, the land was bought in by heirs of the deceasedant on a credit. B who held one of the notes and had a vested right, filed proceedings to set the sale aside for the want of regularity in the sale. The Court sustained B's action and set the sale aside for the reason that B owned one of the notes and had vested right in the property sold.

Wheatly v. Tutt, 4 Kas. 195.

The facts show as follows: Tutt sued Wheatly a non-resident, and attached a lot belonging to him in a town. Tutt recovered judgment for $1483.00, and procured an order of sale of said lot. The sheriff sold half interest in said lot when the order provided for the sale of the entire lot. Wheatly, the Appellant, who had the vested right and was the owner of the lot, instituted proceedings to set aside the sale on the grounds of irregularity. The case was reversed and the sale held erroneous for irregularity. 14 Kas. 195.

Reynolds v. Wilson, 15 Ills. 394, holds as follows:

Wilson, executor of Squires, obtained an order to sell a portion of real estate belonging to Squires, deceased, to pay debts of said deceased. The order of sale provided for advertising of the land by six weeks notice in a newspaper, and the land was sold, and the report of the Executor showed that only four weeks notice were given. The heirs of Squires, deceased, who had a vested right, excepted to the report of the sale for the want of regularity and the sale was set aside by the Court.

It will be seen from the aforesaid authorities cited by the Court of Appeals for the Eighth Circuit, in support of its opinion in this action, that none of them apply to the facts in this case as all the authorities cited by said Court of Appeals refer to cases wherein the party seeking to set aside the judicial sale for irregularity or the want of payment was the party who had a vested right and interest in said action.

In the case at bar the Defendants have no interest in said action and stand as a stranger to the suit, and can not be heard to complain.

The Supreme Court of the United States in the case of Semmes vs. U. S. 91, U. S. page 195, the Court in speaking through Mr. Justice Clifford said:

> "Property condemned as forfeited to the United States under an Act of Congress becomes the property of the United States from the date of the decree of condemnation. Judgment of forfeiture was rendered on the 5th day

of April, 1865, and the land in question became from that date the property of the United States, and it may be well contended that from that time, it could not concern the respondent whether the proceedings of the marshal in selling same were regular or irregular, as the title to the land was lost to him when it became vested in the United States. He now contends that the sale was null because it was not made on the day named in the writ of menditioni exponas; to which the United States makes answer, that he can not be heard to raise that question as his title was dievsted by the decree of condemnation."

But the chief ground, and in fact, the sole one on which the Circuit Court of Appeals decided the case at bar was one which had not been passed upon in either of the Courts below, viz.: That the act of the Choctaw Legislature, under which the sale of the property in question was made, by its terms required that said sale be for cash. That this provision not having been strictly complied with, the sale was therefore void and of no effect.

If this non-compliance with the statue was the result of the Sheriff, in his executive capacity, acting on his own initiative or through ignorance or carelessness, as an examination of every case cited by the Court for the eighth Circuit in support of this theory will show to have been the case, there might be some weihgt to this contention. But where the variance from the strict letter of the law is by agreement of the parties and of the only parties having an in-

terest or a right to be heard, a very different question is presented. As was said in an earlier decision of this Court: in a case involving the legality of the proceedings of local officers to pass the title to land and therefore similar to the case at bar: "Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the king and his officers, though not to his subjects.

Strother v. Lucas, 12 Peters, Page 438.

And in various decisions in this country this precise question has been considered and it was held that though the Statute required the Sheriff to sell for cash, yet by agreement of the parties this might be altered and time allowed.

Second Ed. Am. & Eng. Ency. of Law, Vol. 25, Page 768.

Chase v. Monroe, 30 N. H. 427.

Sauer v. Steinbauer, 14 Wis. 70.

That the Choctaw nation did not agree will not be contended for it was a party to the very transaction. But it may be insisted that the Choctaw Coal & Railway Co. must be a party to such an agreement to bring the case within the rule above set forth. That would be true were it an execution debtor in sheriff's sale or owner

of the equity in foreclosure proceedings. In such cases it would possess an interest which must be conserved. But such is not the case at bar. What interest in the property remained to the appellee company? It was from the beginning but an intruder, its only right in the Indian Country being by virtue of the Act of Congress granting it a right of way, the very terms of which provided that any act on its part "looking toward the change or extinguishment of the present tenure of the Indians in their lands, or any attempt to secure any further grant of land or its occupancy should operate as a forfeiture of all the rights and privileges of said Railroad Co. under this Act." Not only unde rthe foregoing provision did the Railway Co. forfeit its rights in the operation of its road in the Territory, but agian and more specifically when, having been duly notified to dispose of its holdings in accordance with the act of the Choctaw Legislature, approved Oct. 30, 1888, it failed to comply with such requirements, did it lose and absolutely forfeit whatever rights and interests it may have had.

Now, if Appellant's contentions heretofore presented at greater length, that, under the law of the Choctaw Legislature, requiring the sale of the alien holdings within 30 days, was a valid and constitutional enactment, what right remained in the appellee to question the validity of the sale in any respect. It was not the sale by the sheriff that worked the forfeiture. That was merely the method provided for disposing of property already owned absolutely by the Choctaw nation and in which the Appellee, by reason of having broken the laws of that nation, had not the slightest interest. The nation did not wish to hold such properties. Therefore, it provided

for their disposition. And the appellee had no more right to question the mode in which this was effected than if it had never existed in the Territory. Its interest was forfeited and it made no difference whether the property brought $1.00 or $1,000,000, there could be no remainder over to which it was entitled.

A Defendant in ejectment who shows no title to the land in dispute can not take advantage of technical imperfections in Plaintiff's title. McAllister's Lessee v. Williams, 1st Tenn. 334.

SECOND ASSIGNMENT OF ERROR. The Court erred in excluding from the deposition of William Ansley, a witness on behalf of the Plaintiff the following:

> "And the Chief ratified my action as to the sale and paymetn of said property, and instructed me to proceed at once and employ attorneys to assist me in getting possession of the property for the purchsaers, and I at once employed attorneys to assist the Plaintiff, William H. Ansley, in obtaining possession of the property sold by me as sheriff. Mosely and Smith of Denison, Texas, a firm of lawyers, and Cole and Redwine of South McAlester, were employed by the Chief of the Choctaw Nation, to assist the Plaintiff in obtaining possession of the property." Rec. Page 136.

The faithful execution of the laws of the Choctaw nation being vested by the Constitution in the principal Chief and this statute de-

pending upon the Executive Department for its enforcement, it was entirely competent for the Deputy to report to him what he had done that he might govern himself accordingly. The laws with reference thereto could only be inforced in their ultimatum by him, and he could not know the status of affairs except to receive reports from his officers under him. The principal Chief had directed the sale of this property.

Constitution of the Choctaw Nation, Art. 5, Sec. 8. This provision of the Choctaw constitution is self-executing, for it has the manifest intention that it should go into immediate effect, and no legislation is necessary to the enforcement of the duty imposed.

Friedman v. Mathas, 8 Heis (Tenn.) 488.
Peoples v. Hoge, 56 Cal. 612.
Hills v. Chicago, 60 Ills. 86.

THIRD ASSIGNMENT OF ERROR.

The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of a report of Yancy Lewis, Special Master Commissioner, in the case of Longhorn Wister et al., vs. The Choctaw Coal & Railway Company, of July 17th, 1894, and in admitting said report in evidence. The report is not competent and has no relevancy whatever, and is not material to any issue in this case. Rec. Page 136.

FOURTH ASSIGNMENT OF ERROR.

The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of a final order or decree discharging the Receiver in the case of Longhorn, Wister et al. vs. The Choctaw Coal & Railway Company, which was entered on the 22d day of March, 1895, in the United States Court for the Central District of the Indian Territory at South McAlester. This report or decree is not competent nor relevant, nor material to any issue in this case. Rec. Pages 136 and 137.

V.

The Court erred in overruling and disallowin gPlaintiff's objection to the introduction in evidence of a decree in the case of Longhorn, Wister et al. vs. The Choctaw Coal & Railway Company, which was entered on the 17th day of July, 1904, in the United States Court for the Central District of the Indian Territory at South McAlester. The decree is irrelevant, incompetent and immaterial to the issues, and in no sense an adjudication to this Plaintiff's rights, he being neither party nor privy thereto.

Rec. Page 137.

VI.

The Court erred in overruling and disallowing Plaintiff's ob-

jection to the introduction in evidence of the supplemental report of Yancy Lewis, Special Master Commissioner, in the cause of Longhorne, Wister et. al. vs. The Choctaw Coal and Railway Company, the said report being made to the U. S. Court for the Central District of the Indian Territory, and in admitting said report in evidence; to the ruling of said Court in admitting said report in evidence the Appellant then and there excepted.

VII.

The Court erred in overruling and disallowing Plaintiff's objection to the introduction in evidence of the final decree in the cause of Longhorne Wister et al. vs. The Choctaw Coal & Railway Company, which was entered on the 13th day of October, 1894, in the U. S. Court for the Central District for the Indian Territory at South McAlester, and in admitting said final decree in evidence to which ruling of the Court the Appelant then and there excepted.

Rec. Page 137.

VIII.

The Court erred in overruling and disallowing Plaintiff's objectio nto the introduction in evidence of the report of Yancy Lewis, Master in Chancery, in the cause of Edwin Chadick, Trustee. vs. Receiver of the Choctaw Coal & Railway Company in the United States Court for the Central District of the Indian Territory, and in

admitting said report in evidence, over the objection of said Appellant, to which he then and there excepted.

Rec. Page 137.

IX.

The Court erred in ordering and decreeing that the Plaintiff, W. H. Ansley, take nothing b ythis suit, and ordering and decreeing that the Defendant, Francis I. Gowen, Receiver, have and recover of and from the Plaintiff all his costs laid out and expended, to which ruling of the Court Appellant then and there excepted.

Rec. Page 137.

X.

The Court erred in dismissing Plaintiff's suit and refusing to grant the relief sought, and in taxing the plaintiff with the costs in this cause.

Rec. Page 137.

Errors 2, 3, 4, 5, 6, 8, 9 and 10, in the Court of Appeals for the Indian Territory, will be argued together in addition to what has already been said.

Rec. Page 137.

The Honorable United States Court of Appeals for the Indian

Territory, in passing upon this case has predicated its judgment upon two propositions, towit:

First: To state briefly, that the Choctaw statute, under and by virtue of which the property in question was sold by the Choctaw sheriff, is of no effect, and void; and Second, that this action was improperly brought against Receiver, he having previously been discharged.

It will therefore be observed by this Honorable Court, from the inspection of the Record, that the U. S. Court of Appeals in the Indian Territory, has unwittingly fallen into the error of having made issue, etc., a case not made by the pleadings in the case at bar, or even as much as raise an argument of counsel.

Defendants do not in the answer attack the validity of the Choctaw statute, nor is its validity called in question by a demurrer, or any other character or pleading, and the validity or constitutionality of the statute can only be challenged by direct attack and never indirectly, or by implication.

Rec. Pages 26-31.

Not only is the validity of the statute in question denied, but to the contrary, it is to all intents and purposes, admitted.

Defendants in their answer use the following language:

"Defendants further say that said sale was not made

in accordance with the laws of the Choctaw Nation; that the property was sold on a credit; that no notoriety was given."

What stronger or more direct admission could be desired as to the validity of the Choctaw statute than is in this language found? It is clear that it was never in the mind of the pleader to question its validity, and it has not been done.

But the Court, to sustain its contention, has referred us to Mansfield's Digest, Sec. 5054, which is in the language following:

> "When a party files a demurrer with his answer or reply the demurrer must be presented for the consideration of the Court at or before the first calling of the cause for trial after the filing of the same. If he fails to do so the demurrer shall be regarded as waived as to all points except the jurisdiction of the court, and that the pleading demurred to does not state facts sufficient to constitute a cause of action or a defense, counter-claim or set off."

This statute is without any sort of application to the case at bar and in no aspect of the case can it be applied. As will be seen from its language, it can only reach such matters as effect the court's jurisdiction or as belong to the insufficiency of the averred facts to constitute a cause of action, neither of which is raised by demurrer or otherwise, and neither could it be done in good faith and with prob-

ity and sincerety.

The language of the pleadings which the Court had in mind as to raising these questions is as follows:

> "Come now the defendants in the above styled cause, and say that the complaint and the amended complaint filed herein are insufficient in law and upon this they pray the judgment of the Court."

It is most respectfully submitted that this is not a pleading raising a jurisdictional question, neither does it attack the complaint for want of facts sufficient to constitute a cause of action, and if in fact it may be dominated a demurrer at all it is general going to the complaint for want of equity upon its face.

By no intelligent or reasonable rule of construction by which may be measured the scope of pleadings in equity, could it be found that this declaration embodied in defendant's answer questions the complaint for want of facts sufficient to constitute a cause of action. It is for insufficiency in law that the complaint is challenged which is general in its nature and must be treated as having been by the Court below overruled.

And appellant submits most respectfully, but earnestly, and as heretofore suggested, this question has never been made or relied upon by counsel for defendants, but is for the first time raised by the Honorable United States Court of Appeals and decided upon its own motion.

"Defendants cannot go to trial before a jury on the facts of the case and then raise an objection for the first time in this court that the action is one of equitable cognizance.

Burbanks vs. Biglow, 19 U. S. (La. Ed.) p. 51.

It is too late on appeal to object for the first time to the particular form of the action.

Where the subject matter of a suit belongs to a class over which a court of equity has jurisdiction, the objetcion that the complainant had an adequate remedy at law not made until the hearing in the Appellate Court comes too late.

Reynes vs. Dumont, U, S. (La. Ed.) 32, p. 934.

Tyler vs. Savage, U. S. (La. Ed.) 36, p. 82.

Brown vs. Lake Superior Iron Co., U. S. (La. Ed.) 33, p. 102.

Appearing and pleading to the action waives al misjoinder of parties.

Campbell vs. Haverhill, U. S. (La. Ed.) 39, p. 280.

The Choctaw Nation has full power and authority to pass laws governing its own people and to sell its own property.

Thebo vs. The Choctaw Tribe of Indians, 13 C. C. A., page 519.

Nethlin et al. vs. Ice, 5. C. C. A., page 43.

Cornell's Judges et al. vs. Shannon et al., 11, C. C. A., page 465.

But as a further answer to this contention that the Choctaw statute was unconstitutional, this Honorable Court has, in effect, sustained a statute of similar import, and which had a direct attack made upon it and was presented to the Court squarely for its judgment and determination.

Hockett vs. Alston, 58 S. W. R. Page 676.
Hockett vs. Alston, 110 Fed. Rep. Page 910.

The Second proposition set forth by the Honorable United States Court of Appeals for the Indian Territory; that the Receiver had been discharged at the time of bringing this action, etc., as viewed by Appellant, is not determinative of any issue in the case and has but little bearing upon it.

It will be observed that the beneficiaries named in the trust deed, Hartshorne and Alderson, deny that they are the beneficiaries, or that they ever advanced one cent of the money with which the improvements were made.

The mortgagor, Sittel, claims no equity or other interests in the property; the beneficiary brought forward in the answer under the trust deed an dasserted to be the party advancing the money with which the improvements in question were made, is a dead and dis-

solved corporation with its stockholders unknown and scattered to the four winds, and its affairs passed through the hands of the Receiver with never a mention of the improvements in question as an asset of the defunct corporation; no sort of claim made then when creditors would be benefited by this corporation to this property as an asset. The trustee being vested with whatever title the trust deed could confer, and with the actual and physical possession of the property, and the mortgagor disclaiming all interest in the property mortgaged, and the beneficiary, as set out in the answer, being a dissolved and bankrupt corporation with its stockholders sctatered to the four corners of the earth and failing and refusing to count the improvements in question an asset to be administered by the Receiver for the benefit of creditors is substantial evidence of the fact that such beneficiary, if beneficiary at all, clearly recognized the fact that said improvements were forfeited to the Choctaw Nation because made in violation of law.

In the decree of sale is nowhere to be found the property in question, it was not intended to be sold, was not sold, and the commissioner had no power to sell it and the purchasers no power to buy it. The property and franchise of the Choctaw Coal & Railway Co. were sold by said commissioner to Sidney F. Tyler and others, a committee appointed by the stockholders and creditors of the Choctaw Coal & Railway Co. to purchase same, and which purchase was made by said committee for the Choctaw, Okalhoma && Gulf Railroad Co., a company organized by Act of Congress of August 24, 1894, to take title thereto, and which Act specially provides "that

such new corporation shall not have the right to acquire and hold any houses or buildings at South McAlester situated off the right of way and depot grounds of said Choctaw Coal and Railway Co. The property decreed to be sold in said decree is particularly itemized and set forth.

Rec. pp. 75-100.

The property in question was never in the hands of the receiver and no decree was ever made to sell it in the receiver suit, but it was always in the hands of the trustee, first Chadick, then McLoud, who was substituted for Chadick in the trust deed and who finally sold the same. The receiver was made a party simply because of the allegations in the complaint that he had assciated himself with the trustee and made some of the most valuable improvements on the property. If the receiver was an improper party, a motion in the court below to strike was the proper remedy or demurrer for misjoinder of parties.

But the record discloses that on the 4th day of October, 1895, more than eighteen months after the decree discharging the receiver, that the case of Chadick, Trustee, vs. Receivers of the Choctaw Coal and Railway Co., was heard on the report of Yancey Lewis, Special Master in Chancery, wherein it was adjudged that J. W. McCloud was the legal and proper trustee for the Choctaw Coal and Railway Co., under said mortgage or deed of trust, and entitled to exercise all the powers conferred, and fully authorized and empowered to sell said property, which was the same property now in question, and that

in pursuance of said decree, said McLoud did, on the 30th day of December, 1895, sell the same, at which sale Hon. Yancey Lewis and others became the purchasers; yet Defendants, with full knowledge of all these facts, attempt to procure this Court to believe that his sale was made by the receiver and that the receiver had been discharged before the action was begun, and therefore this suit must fail.

Rec. pp. 18, 19, 20, 90-128.

In the receiver suit the property now in question was never treated as an asset of the Choctaw Coal & Railway Co., for it was always known that it had no title and could convey none to the purchaser; therefore it was allowed to remain in the hands of the trustee and was sold by the trustee more than eighteen months after the receiver's sale and to an entirely different purchaser. A corporation had been organized by a special act of Congress to take over the assets of the Choctaw Coal & Railway Co., known as the Choctaw, Oklahoma and Gulf Railroad Company, and if the property now in question was an asset, why was it not conveyed with the other assets of the Choctaw Coal & Railway Co., to the Choctaw Oklahoma & Gulf Railroad Co., the purchaser? Simply because it was not an asset and it was known to Congress that it was not an asset, hence, the legislation forbidding its purchase. It was a most extraordinary thing for the Congress of the United States to forbid the purchase of this property by the new Company which it had created and it would not have done so except it was absolutely convinced that the

proposed seller had no title and that in its procurement, in its occupation, a great wrong had been perpertrated wantonly and without excuse upon the Nation's own ward.

The thing that precipitated this suit and caused it to be filed when it was the fact that the trustee had advertised the property for the sale and unless restrained would sell the same on December 30, 1895, as before stated. Injunction was denied and the property sold, or at least the record shows that it was advertised for sale by the trustee, and the Court will presume that the trustee made the sale.

Rec. pp. 19 and 26.

The trust deed shows on its face a most palpable fraud practiced on the Choctaw Nation. In the first place it was not executed for more than a year after the improvements had been made, showing that the Choctaw Coal & Railway Co., deliberately and willfully in violation of positive law and every principle of justice and right and common honesty, walked in and took charge of the premises and went to erecting houses upon the same in defiance of the laws of the Choctaw Nation and of the Statutes and treaties of the United States. Furthermore it appears that $86,000 in round numbers was spent while only $45,000 was secured by the trust deed. How did they expect to secure the remainder? It seems strange that the Choctaw Coal & Railway Co., would make $42,000 in improvements for Mr. Sittel without any security at all. The whole thing was a

fraud and a subterfuge undertaken to be worked through Sittel to procure possession of the property of the Choctaw Nation. Sittel says so. Chadick says so. Sittel had no power to make such disposition of the property. He could not mortgage it to others to erect houses thereon in violation of the laws of the Choctaw Nation. The Railroad Co., could not erect the houses off of its right of way because both the laws of the United States and of the Choctaw Nation prohibited it. Sittel could not confer upon the Company the right to do that which the law prohibited.

But as a further and complete answer to this whole matter no question was ever made as proper and necessary parties to the action in the United States Court for the Central District of the Indian Territory, and could not for the first time be made in the United States Court of Appeals or in this Court.

Story v. Livingston, 13 Pet. (U. S.) 359.

John Cary et al v. Henry T. Brown, 92 U S. 470.

The necessary parties so far as the record shows, have all been impleaded. The demurrer does not name the parties which the defendants claim should have been joined. The Fifty-second and fifty-third equity rules require that the fact that parties in interest are not before the court, be set up by plea or answer.

If the defect of parties appears on the face of the bill objection may be raised by Demurrer; but if the defect is not apparent, a defendant must set up the defect by plea or answer, pointing out and naming the persons who ought to be made parties and giving the

reasons therefor.

Sheffield and B. Coal, Iron and Railway Co. v. Newman, 23 U. S. C. C. A. 463.

Greenleaf v. Queen, 1 Pet. U. S. 138.

Segee v. Thomas, 3 Blatch, 11 Fed. Cas. No. 12, 633.

Florence Sewing Machine Co. v. Singer Mfg, Co. 8. Blach, 113 Fed. Cas. No. 4, 884.

U. S. v. Gillespie, 6 Fed. 803.

As it appears from the record there is no beneficiary named in the trust deed who has any interest, and the party named in appellant's answer, the Choctaw Coal & Railway Co., as having advanced the money with which the improvements in question were made, and now seeks to follow it into the improvements and have it impressed as an equity upon the same made such advancement with full knowledge of its unlawful character, declined to report it as a corporate asset to the receiver which it was duty bound to do if it was an asset and was administered upon as an insolvent corporation and its character dissolved and determined without ever bringing forward or asserting whatever rights it claimed is not such beneficiary as is required to be made a party in the first instance, and if it claimed rights as a beneficiary it should have by proper pleading had itself or its interest made a party by a trustee appointed for this purpose if the receiver had been discharged and could no longer represent its interests or if the same could not be protected by the trustee. Appellant vouchesafes the statement that it was wholly unnecessary to make

anyone a party defendant except the trustee under the facts as they appear in the record of this case and that the making of the receiver a party at all was simply because of a situation heretofore stated, and for the reason that said receiver had associated himself with the trustee and completed some of the buildings as aforesaid.

It was advanced in argument by defendant in the court below and we therefore assume will be here, that the complaint is insufficient to confer jurisdiction upon a court of equity to remove cloud from title, etc.

Ifthere was anything in this contention of appellees if raised at the proper time it must fail here for the reason that the jurisdiction of the court for want of sufficiency of the complaint or otherwise not having been questioned in the Court below can not now for the first time be raised here. To permit this to be done would be to disregard all the established rules of practice and allow an entirely different case to be made in the Court of Appeals to that which was made in the court below, which would work destruction of the appellate character of this Court and resolve it into a court of original jurisdiction.

In the first place this is not an action simply to remove cloud from title, but it is also an action for posession. Appellant does not claim title to the soil, but only to the right of occupancy. Appellant does claim title to the improvements and the righ of occupancy and he avers the paramount legal title to the improvements to be in him by virtue of the Sheriff's sale of Tobucksey County and the war-

ranty deed executed by said sheriff in pursuance thereof to him, Pusley and Richards, and the conveyance of Pusley and Richards to appellant.

It will further appear to this Honorable Court that it was pre-eminently proper to bring this action in a court of equity and that in fact it could have been brought and maintained in no other court for the reason that it seeks to have cancelled and set aside a mortgage or trust deed for fraud and want of authority to execute and to enjoin a sale of the property under and by virtue of said fraudulent mortgage or trust deed, to have decreed to plaintiff the legal title to the improvements and to possession of the same and the right of occupancy of the soil which must necessarily follow the right of possession of the improvements.

Where the subject matter of a suit belongs to a class over which a court of equity has jurisdiction the objection that the complainant had an adequate remedy at law not made until the hearing made in the appellate court comes too late.

Reynes v. Dumont, U. S. (La. Ed.) 32 p. 934.

Tyler v. Savage, U. S., (La. Ed.) 36, p. 82.

Brown v. Lake Superior Iron Co., U.S. (La. Ed.) 36 p. 82.

Brown v. Lake Superior Iron Co., U. S. (La. Ed.) 33, p. 102.

Campbell v. Haverhill, U. S. (La. Ed.) 39, p. 280.

Assignment of Errors 3, 4, 5, 6, 7 and 8, of the United Sattes Circuit Court of Appeals for the Eighth Circuit will be considered and argued together. Rec. pp. 140-141.

The authorities heretofore cited in this brief in support of the assignment of errors 1 and 2 of said United States Circuit Court of Appeals for the Eighth Circuit are herein referred to and it is contended by Appellant that said authorities fully sustain the position taken by Appellant in this case, that the United States Circuit Court of Appeals for the Eighth Circuit, erred in holding that it was necessary for the purchasers of this property in controversy at the sheriff's sale to pay cash for the same. As before stated, when the property became forfeited to the Choctaw Nation, as is fully shown by authorities cited, defendants lost all interest in the properyt, and when the property was sold the Nation was satisfied and defendants could not raise any objection as to the sale or payment. At the time this action was filed the United States Court in the Indian Territory had full jurisdiction of the parties and the subject matter.

The United States Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals for the Eighth Circuit, have both rendered opinions in this case, and each Court has decided the case on a different proposition of law. The United States Court of Appeals for the Indian Territory held in its opinion, that the Indian statute under which the sale was made, was null and void, and unconstitutional, practically holding by implication, that if the statute

had have been valid, the sheriff's sale would have been binding and Plaintiff would have acquired a good title by the purchase.

The United States Circuit Court of Appeals for the Eighth Circuit held in its opinion that the sale was void for the reason the purchaser did not pay cash for the property, thus admitting in its opinion that the Indian statute under which the sheriff made the sale, was a valid statute, and constitutional, and if said purchaser at sheriff's sale had have paid cash for the property as the statute provided, that they would have acquired good title.

Thus we find two Appellate Courts practically holding contrary to each other on two main propositions of law in this case.

We submit as a second proposition of law, that the Choctaw statute under which the sale was made, is constitutional and valid.

Hockett v. Alderson, 58 S. W. R. p. 667.

Hockett v. Alderson, 110 Fed Rep. 910.

Thebo v. Choctaw Tribe of Indians, 13 C. C. A. p. 519.

It is further submitted by Appellant that the sale made by the Indian sheriff and ratified and accepted by the Chief and Council, was absolutely binding upon the Choctaw Nation, and gave Appellant a good and sufficient title upon which to base this action, and that no one can raise any objection to the sale except the Choctaw

Nation, and said Nation is satisfied and has executed its deed for the property, and desires that the Appellant secure possession of the same.

It is contended by Appellant that no judicial sale can be set aside for irregularity, unless the party seeking to set aside said sale has a vested right. And defendants in this case having no vested right in the aforesaid property, the same being forfeited to the Choctaw Nation, Appellant's action is complete and must prevail in this case.

It is therefore; respectfully submitted: That the judgment of the United States Court for the Central District of the Indian Territory, the United Staes Court of Appeals for the Indian Territory, and the United States Circuit Court of Appeals for the Eighth Circuit, are erroneous for the errors heretofore assigned and should be reversed, and the relief sought in Complaintant's bill granted.

Respectfully,

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